SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN R. SCANNELL,

Lawyer, Bar No. 31035

v.

vs.

STATE OF WASHINGTON, WASHINGTON STATE BAR ASSOCIATION, SCOTT BUSBY WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY COMMITTEE, BOARD MEMBERS ANDERSON, BAHN, BARNES, CENA, COPPINGER-CARTER, GREENWICH, HANDMACHER, MEEHAN, STILES, UREFIA, and all members of the Disciplinary Board in both their individual and official capacity, and all disciplinary counsel in both their individual and official capacity.

Defendant

No. 200, 737-6

LAWYER'S RESPONSE TO ASSOCIATION'S PETITION FOR INTERIM SUSPENSION

CROSS PETITION FOR DISMISSAL ON GROUNDS OF PROSECUTORIAL MISCONDUCT, REMOVAL OF DISCIPLINARY BOARD FROM POSITIONS FOR JUDICIAL MISCONDUCT, WRIT OF PROHIBITION, MANDAMUS, INJUNCTION, COMPLAINT FOR DECLARATORY JUDGMENT

Herald, read the accusation!' said the King.

On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:--

The Queen of Hearts, she made some tarts,
All on a summer day:
The Knave of Hearts, he stole
those tarts, And took them quite away!

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

`Consider your verdict,' the King said to the jury.

Not yet, not yet!' the Rabbit hastily interrupted. `There's a great deal to come before that!

Lewis Caroll, Chapter 11, Alice in Wonderland

The Washington State Bar Association has petitioned this court for the removal of the above named attorney under ELC 7.2.(a)(2). The Association purports to claim that the attorney, by filing for protective orders for unconstitutional subpoenas and complaining about the Disciplinary Board's refusal to properly handle these motions, has committed misconduct requiring disbarment and immediate suspension. As the cross petition submitted herein demonstrates, the board is taking this unprecedent action to cover for their own misconduct, and that of the Disciplinary Counsel in this case, Scott Busby.

The lawyer cited above demands that this proceeding be dismissed as well as all charges associated with it. He charges that multiple counts of appearance of fairness violations, ex parte contacts between hearing officer, a previous hearing officer, the disciplinary review committee that returned the charges, the disciplinary review committee, the chairman of a disciplinary review committee, and the disciplinary committee as a whole have rendered further proceedings useless and void. He further contends that the hearing officer lacked jurisdiction to hear these charges, as the underlying action is an attempt to enforce a subpoena, which the Supreme Court has declared through the ELC and the Civil Rules cannot be enforced because there is a pending motion to terminate that has not been ruled upon.. He has been denied due process at every turn, because of an unprecedented power grab by Disciplinary Counsel in which he claims to have the power of a one man grand jury, a concept unheard of in the history of the United States. Through misuse of what Disciplinary Counsel calls "pre-charging subpoenas" he hopes to set a dangerous precedent which could lead to a police state in the United States of America. The hearing officer and Disciplinary Board supported this harassment, knowing full well that it was taken in retaliation for the lawyer's previous grievances against the bar and representation of

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Paul King, by imposing sanctions and making findings that are without precedent before the Disciplinary Board and the Washington State Supreme Court.

STATEMENT OF FACTS

The lawyer stands accused, according to counts 2 and 4 of this action of filing frivolous motions, failing to attend depositions and failing to provide information as required the Rules of Professional Conduct. At the heart of the issue is whether ELC 5.5 allows Disciplinary Counsel to conduct depositions without giving notice to anyone but the witness. The Supreme Court has already ruled in **State v. Miles**, 156 P.3d 864, 160 Wash.2d 236 (Wash. 04/26/2007) that such a subpoena lacks the force of law, yet for some unexplained reason, both the Disciplinary Counsel and the hearing examiner ignore this ruling and contend that the lawyer should be suspended for attempting to quash a subpoena that lacks the force of law.

Before October 18, 2005, the lawyer was served with two subpoenas duces tecum requiring him to appear for a deposition pursuant to ELC 5.5 (Exhibit A-413, A414). One subpoena was issued pursuant to WSBA file No. 05-00312, which concerns the lawyer's client Paul Matthew's[1]. The other was issued pursuant to WSBA file No. 00873, which concerns one Kurt Rahrig[2].

The second subpoena sought all documents relating to Kurt Rahrig and/or **Kurt Rahrig v. Alcatel USA Marketing Inc. et al**, including e-mails (Ex. A-414 p. 4-5).

The deposition commenced on November 1, 2005, but was suspended when the lawyer made a demand pursuant to CR 30(d) that the deposition be suspended to permit him to file a motion to terminate or limit the scope of the examination. (Ex. A-416. 5:13-23, 6:1-3). The motion was made after the following exchange:

---

[1] Exhibit A-413, P. 2,3
[2] Exhibit A-413, P. 4,5

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Q. And you understand that failure of a lawyer to cooperate fully and promptly with an investigation may constitute grounds for discipline under the Rules for Enforcement of Lawyer Conduct?
A. Yes.
Q. And finally, you understand that you may not assert the attorney/client privilege or other prohibitions on revealing your client's confidences or secrets as a ground for refusing to provide information during the course of an investigation under Rule 5.4 of the Rules for Enforcement of Lawyer Conduct?
A. Subject to 5.4(b), which states that nothing in these rules waives or requires waiver of any lawyer's own privilege or other protection as client against the disclosure of confidences or secrets.
Q. That's correct. And you are looking at 5.4(b) and you are referring to the provision regarding your own confidences or secrets, but that is you as client rather than you as attorney?
A. That's not the way I interpret it.
Q. Tell me how you interpret it.
A. At this point in time I'm going to move under ELC 5.5 which refers to Civil Rule 30, Civil Rule 30(d). I'm going to bring a motion to terminate this examination with respect to both subpoenas that were issued to me; one in the Rahrig case, that's 05-00873 and also under 05-00312 which involves Paul Matthew's.
Q. And you --
A. I'm going to make a demand under Civil Rule 30(d) that the taking of the deposition shall be suspended for the time necessary to make a motion for an order, and I'm going to be making a motion for under – for both subpoenas. Hopefully it will be finished by the end of the day. Ex. A-416, p. 5, l. 13 through p. 6, l. 25)

Ignoring lawyer's demand to terminate the deposition, Mr Busby attempted to continue:

Q. Okay, Well, I intend to continue with the deposition today, Mr. Scannell, and you can chose how you wish to proceed, but I think the subpoenas are validly issued and I intend to proceed.

As to the subpoena, it appears that another attorney, Paul King, is the target of the investigation regarding Kurt Rahrig (CP 13, Exhibit B). The lawyer has represented Mr. King before the Washington State Bar Association and in a subsequent appeal to the Washington State Supreme Court (currently being litigated). (In re: King No. 7370).

Mr. Rahrig appears to be claiming that Mr. King engaged in the unauthorized practice of law by participating in a case in Federal Court in Virginia while suspended from the State Bar in Washington (CP 13, Ex. B:9-14).

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

It is unclear whether or not Mr. Rahrig is alleging that the lawyer engaged in any misconduct. The lawyer maintains in his response (Ex. A-411) that he was never consulted regarding the Rahrig matter. He additionally maintains that he is not a partner of Mr. King, and did not associate on the case with Mr. King. All parties agree that the lawyer and Mr. Rahrig only met briefly on one or two occasions, that the lawyer never performed any legal services for Mr. Rahrig, and that the lawyer never agreed to represent Mr. Rahrig. (CP 13, Ex. B, Ex. A-411, Dec 1 Tr. 82, l.10-13, Tr. 84. L. 13-25, Tr. 116, l.8, to 117, l. 8.)

A motion to limit the scope of the deposition concerning Mr. Rahrig was made earlier, when the lawyer complained among other things, that the WSBA lacked jurisdiction to investigate a grievance concerning alleged representation of a client in Virginia, and that the deposition was designed to elicit privileged attorney client information that had not been waived by Mr. King. (Ex. 417). The Chairman of the Disciplinary Board, purporting to have some kind of authority to rule on the motion, denied the motion without giving reasons for his decision. (Ex.. A-421)

Acting upon the "order" issued by the previous Chair of the Disciplinary Counsel, Disciplinary Counsel issued another subpoena to Scannell, this time not giving notice to Mr. King.

After Mr. Busby rescheduled the deposition, Scannell requested proof of service that Mr. King was notified of the deposition (Exhibit 433, p. 4, l. 9). Disciplinary Counsel apparently takes the position that he is not bound by CR 30 with respect to notifying parties to the taking of a deposition.(Ex. 433, p. 4, l. 16, 17)

Another motion for protective order was filed. (Ex. 434) This time Gail McMonagle issued an "order" on behalf of the Bar.(Ex. 439). Scannell complained through a motion for reconsideration that she did not have authority but his motion was denied with another "order." (Ex. A-441, A-446)..

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

So far the lawyer has been unsuccessful in obtaining copies of the minutes of the Bar Association Disciplinary Committee minutes to shed any light on how Ms. Mcmonagle asserts her authority. (Dec. 3 Tr. P. 136, l. 7-11).

On June 11, 2007, James M. Danielson issued an order appointing Mary Wechsler as a hearing officer. (CR 5.00) This was served on John Scannell by mail on June 11, 2007..(CR 5.00) On June 15, 2007, John Scannell filed a Motion to Disqualify the Hearing Officer, the Chief Hearing Officer, the Chairman of the Disciplinary Committee, and the Disciplinary Committee as a whole for cause.(CR 7.00). On June 21, 2007, he filed a motion to disqualify the hearing officer without cause by mailing it to the James M. Danielson and serving it on the WSBA offices and the Offices of Mary H. Weschler. (CR 10.00)

Disciplinary Counsel filed a response claiming that the request to disqualify for cause was rendered moot by filing the request to remove without cause. It was served on lawyer Scannell by mail on June 25, 2007. (CR 14.00)

Without waiting for a response from the lawyer explaining why the request did not render the previous motion moot, the Chief Hearing Officer, on the very same day, June 25, 2007, removed the hearing officer, and appointed himself as hearing officer. (CR 16.00, 17.00) This was served on the lawyer when it was dropped in the mail on June 25, 2007. (CR 16.00, 17.00) On July 6, 2007, the lawyer appealed the decision of the hearing officer appointing himself as well as brought a motion to disqualify the hearing officer, the Chair of the Disciplinary Board, and the entire Disciplinary Board for cause. (CR 18.00, CR 19.00). He also brought a motion to request the removal of the hearing officer without cause.(CR 20.00). On July 10, 2007, the Chief Hearing Officer denied the motion to remove the hearing officer for Cause.

On July 24, 2007, the lawyer appealed the Chief Hearing Officer's order not disqualifying himself for cause. (CR 28). This motion was denied on September 26, 2007, by the Chairman of the Disciplinary Committee along with all other motions and appeals including

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

the motion to disqualify the hearing officer without cause (CR 33.00). By this time, any decisions by members of the Disciplinary Board were improper because they had been having ex parte with the Disciplinary Counsel. In a related Superior Court action filed in conjunction with this case, the entire Disciplinary Committee hired joint counsel with a hearing officer that has heard the same issues that were heard in this case. Since the ELC provides that the decision to disqualify a hearing officer rests with the Chief Hearing Officer, The Chief Hearing Officer later removed himself as hearing officer. (CR 35.00).

Timothy Parker of Carney Badley Spellman was then appointed as hearing officer by the Chief Hearing Officer, who had already removed himself from the case.(CR 36.00). On July 16th, 2008, Mr. Parker called a telephone hearing on short notice for the purpose of discussing a trial date. (CR 42.00) At this hearing, the parties could not agree on a trial date. Over the respondent lawyer's objection, the hearing officer ordered the hearing held on December 1, 2008. The charged lawyer specifically requested that the hearing officer follow the ELC rules and allow motions to be filed so the issue could be addressed properly. The hearing officer refused and set the hearing for December 1-5 and 8-10, 2008.

Disciplinary Counsel, realizing that the charged lawyer was correct, immediately filed a motion to set the hearing date.(CR 38.00) respondent responded to the motion. (CR 40.00) However, on July 30 2008, the ordered the matter to hearing based upon his earlier oral ruling, without considering arguments of either counsel.(CR 42.00)

On September 16, 2008, the lawyer brought a motion to disqualify the hearing officer, the chair of the Disciplinary Board and the Disciplinary Board as a whole for cause.(CR 49.00) He also brought a Motion for Discovery pursuant to ELC 10.11 that sought not only documents related to the issues raised by Disciplinary Counsel, but various issues raised in his answer (CR 50.00). In his Answer to the Charges filed on June 22, 2007, the lawyer alleged various affirmative defenses, such as retaliation for his filing of a grievance concerning Christine

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Gregoire in 2000 as well as his representation of Paul King which followed. (CR 9.00) In the Gregoire grievance, the lawyer claimed that Christine Gregoire had not provided sufficient oversight to Janet Capps when Ms. Capps failed to file a notice of appeal which cost taxpayers $17 million. The answer alleged that at the time the Ms. Gregoire grievance was filed, Loretta Lamb, the supervisor of Ms. Capps and direct subordinate Ms. Gregoire, was chairman of the disciplinary board. The lawyer alleged that Loretta Lamb was able to use her position on the board to get the board to retaliate against Mr. King and the lawyer. In his discovery he requested all documents from the Gregoire grievance file as well documents from Paul King's file and his own file concerning the discipline that occurred over the past few years. He also sought emails not covered by attorney client privilege from Disciplinary Counsel concerning Paul King and John Scannell for this period of time. (CR 50.00). Finally, he sought access to minutes from the Disciplinary Board concerning this period of time. After a response was filed, the hearing officer issued an order on October 8, 2008, which granted discovery on documents that were covered by the charges made by Disciplinary Counsel, but denied documents concerning his request for information on Gregoire, Paul King's other grievances, the e-mails, and minutes from the Disciplinary Board. (CR 55.00, 64.00)

On November 3, 2008, Disciplinary Counsel brought a motion requesting Scott Busby be allowed to continue as advocate for the Disciplinary Counsel's office. (CR 67.00). On November 10, 2008, Disciplinary Counsel made a demand under ELC 10.13(c) for all documents in the possession of the plaintiff concerning Rahrig, as well as all e-mail's concerning him. (CR 72.00). On November 17, 2008, the lawyer brought a motion to compel and a motion for continuance concerning the Associations failure to provide him with discovery. The lawyer brought a motion for continuance in order to respond to the demand for e-mails on November 20 2008. (CR 81.00)

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

A hearing was held on December 1, 2, 3, 4 of 2008 and a transcript was made of the hearing. On December 2, 2008, the hearing officer issued an order allowing the discovery under ELC 10.11.(CR 100.00, CR 101.00). After briefing and a Motion to Disqualify the entire Board for Misconduct (CR 137.00), the hearing officer issued Findings of Fact and Conclusions of Law on February 3, 2009. (CR 106.00, CR 108.00, CR 110.00, CR 121.00)

Neither party appealed the decision of the hearing examiner as the Disciplinary Board reviews a recommendation of suspension automatically. After briefing, (CR 125.00, CR 130.00, CR 135.00), the undersigned lawyer filed a motion to disqualify the entire board based upon misconduct CR 137.00, CR 144.00). In their initial finding the board ignored the motion to disqualify and simply upheld the hearing examiner's recitation of the facts concluding the lawyer should be disbarred instead of suspended for two years.(CR 142

OPPOSITION TO THE DISCIPLINARY BOARD'S ADOPTED STATEMENT OF FACTS AND CONCLUSIONS OF LAW THAT WERE FOUND BY THE HEARING EXAMINER:

ERRORS IN FINDINGS OF FACT

1.1.1 The hearing officer misstated the original charge. The original charge is ambiguous as to what the lawyer was charged with. The original charge did not state whether the lawyer was charged with failing to obtain a written consent or providing a full disclosure or both. In this regard it was deficient in that it did not provide the lawyer with reasonable notice as to what was being charged.

Findings 1.1.4 and 1.15 are not supported by the record. The record indicates that the interests of Paul Matthew's, Stacy Matthew's, and the undersigned were all aligned at all stages of the litigation. There is no evidence that shows that any of these interests "might" have been compromised by joint representation. Disciplinary Counsel points to **In re Disciplinary Proceeding of Marshall**, 160 Wn.2d 317, 157 {/3d 859 (2007) for the idea that only a potential

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

conflict, need arise for the disclosure to be made in writing. That decision was not decided until 2007 which was long after the conduct in question and was not a unanimous decision. The Marshall decision has never been clarified to distinguish how probable a potential conflict must be before it rises to the level of a violation of the RPC. RPC 1.7(a)(2) states there must be a "significant risk" that the representation will be materially limited. There was no evidence of "significant risk" in this litigation.

Marshall is distinguishable from the case at bar. There, the court decided that the claims of the parties were different even though they shared the broad goal of stopping discrimination. Here, there is no evidence that the individual goals of the Matthews deviated at all during the litigation, other than the speculation testimony of a later counsel[3]. In addition, in **Marshall**, there was a finding that there was no disclosure by the counsel. Here there is abundant uncontroverted evidence that disclosure was made, and that disclosure was approved after the fact by a superior court judge. [4]

There is no support for 1.1.6. Since an oral disclosure was made, there is no evidence that any potential harm came to either the justice system nor the Matthews.

The undersigned objects to finding 1.2.3. ELC 5.3(c) allows the undersigned to make a request for deferral and the record (specifically p. 82-85, December 3, 2008) shows a legitimate reason how an investigation could compromise the rights of the parties.

There is no support in the record for the conclusion of 1.2.5 and for 1.2.6. The record (Ex 416) shows that the deposition was terminated due to Mr. Busby's insistence on continuing the questioning in the Rahrig matter, not because of the Matthews matter. Therefore, at the time the Matthews motion was filed, the deposition had already been delayed. There is nothing in the

[3] Undersigned properly objected to speculations of the defense attorney at p. 156, l. 23 to p. 157; l. 5; p. 158, l. 20, to p. 159, l. 3 and re-raises them here.

[4] Dec. 2, P. 89, l. 12-18, P.95, l.7-10, P. 97, l. 4-17; Dec. 3, P. 146, l.15, P.148, l. 2; Dec. 4, p. 48, l.13-17

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

record that suggested that the motion delayed it further for any significant period of time. The record shows that once a ruling was made, however illegitimate it was, the deposition was allowed to take place.

The finding of 1.3.3 is objected to. The record (Page 6 of Exhibit 416) clearly demonstrates that Mr. Busby was asserting that the undersigned had no right to assert attorney client privilege on behalf of Mr. King. A reasonable conclusion of this was that Mr. Busby was conducting the deposition for that very purpose. Since Mr. Scannell represented Mr. King on issues before the bar, he had a legitimate reason for seeking a motion to terminate. Furthermore, the undersigned denies that that motion was ruled upon as there is no authority for the proposition that the chairman of the disciplinary board can unilaterally act on behalf of the board as a whole when charges have not been filed.

The finding of 1.3.4 is objected to as the reasons for demanding witness fees was not frivolous. Disciplinary Counsel claims that witness fees required in "civil cases" in RCW 2.40.020 are not applicable because ELC 10.14(a) states that hearing officer should be guided in their evidentiary and procedural rules by the principle that disciplinary proceedings are neither civil nor criminal but are suit generis... hearings. But the subpoena issued under ELC 5.5 is not being issued for a disciplinary proceeding under ELC 10. No hearing officer has been appointed and no charges were filed. ELC 5.5 refers to CR 30 as the procedure for following in conducting a deposition. ELC 30(a) in turn states that a subpoena should be served as in CR 45. Significantly, CR 45(d) refers to RCW 5.56.010 as a basis as to how subpoenas are issued for trial. RCW 5.56.10 states as follows:

> Any person may be compelled to attend as a witness before any court of record, judge, commissioner, or referee, in any civil action or proceeding in this state. No such person shall be compelled to attend as a witness in any civil action or proceeding unless the fees be paid or tendered him which are allowed by law for one day's attendance as a witness and for traveling to and returning from the place where he is required to attend, together with any allowance for meals and lodging

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

> theretofore fixed as specified herein: PROVIDED, That such fees be demanded by any witness residing within the same county where such court of record, judge, commissioner, or referee is located, or within twenty miles of the place where such court is located, at the time of service of the subpoena: PROVIDED FURTHER, That a party desiring the attendance of a witness residing outside of the county in which such action or proceeding is pending, or more than twenty miles of the place where such court is located, shall apply ex parte to such court, or to the judge, commissioner, referee or clerk thereof, who, if such application be granted and a subpoena issued, shall fix without notice an allowance for meals and lodging, if any to be allowed, together with necessary travel expenses, and the amounts so fixed shall be endorsed upon the subpoena and tendered to such witness at the time of the service of the subpoena: PROVIDED FURTHER, That the court shall fix and allow at or after trial such additional amounts for meals, lodging and travel as it may deem reasonable for the attendance of such witness

Ironically, the revisor's note to RCW 2.40 cites Title 5 as the basis for compensating witnesses in depositions. So it appears that the Supreme Court, when it crafted ELC 5.5, may have intended the deposition to be a "civil proceeding" as opposed to a sui generis hearing when it referred to CR 30 as to how the deposition should be conducted. Significantly ELC 5.5(b) states that subpoenas must be served as in "civil cases", which in turn is the exact language of RCW 2.40.020.

If the intent of the Disciplinary Board was to waive the $12 filing fee so as to avoid a delay, then why not pay the $12 immediately or after a short delay as was done before? The only delay in the proceeding was caused by Disciplinary Counsel's delay in paying the $12. By paying the $12 he has waived any grounds for the present complaint. The court in **Hawkinson v. Conniff**, 53 Wn.2d 454, 334 P.2d 540 (1959) described the voluntary payment rule as "a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge by the payor of the facts upon which the claim is based cannot be recovered on the ground that the claim was illegal or there was no liability to pay in the first instance."

Finally, in Washington, it has long been held that a disbarment proceeding is a civil and not a criminal one. **In re Jett**, 108 P.2d 635, 6 Wash.2d 724. **In re Little**, 40 Wash.2d 421, 244

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

P.2d 255. As the law only distinguishes between civil and criminal with respect to the payment of witness fees, the former is the one applicable.

The issue of witness fees in a bar proceeding has not been ruled upon yet by our Supreme Court. The lawyer should not be penalized for raising an issue of first impression that has probable or even possible merit.

The finding of 1.3.5 is objected to for reasons argued later in this brief.

The finding of 1.3.6 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.7 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.9 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.10 is objected to on the grounds that it is meaningless with respect to the computer search. The record clearly shows that the lawyer made a good faith effort to search his computer and that none of the emails significantly contributed to the record. Given the state of today's technology, it is doubtful that any lawyer could say for certainty that he could produce every email on a certain case, especially an attorney who has over 250,000 emails in his mailbox.

This finding ignores the time distance between ELC 5(b) request and the ELC 10.13(c) demand. The ELC 5(b) request was made in October of 2005. The ELC 10.13 demand was made in November of 2008, over 3 years later. If Disciplinary Counsel had limited the 10.13 demand to that requested in 2005, it would have been much easier to respond to. As it is, the hearing examiner is retroactively sanctioning lawyer for not recognizing that a demand made four years ago would become more onerous in the future.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Finally, there is no support for 1.4. Respondent's conduct of refusing to cooperate with an unconstitutional subpoena that lacked force of law, did not delay the investigation at all. It was the unwillingness of disciplinary counsel to notify the targets of the subpoena, as well as the abject refusal of the disciplinary board to rule on his motions that led to the delay.

ERRORS IN CONCLUSIONS OF LAW

The undersigned objects to Conclusions of Law 2.1, 2.2, and 2.3 for the aforementioned reasons. The undersigned objects to Conclusion of Law 2.4, on the grounds that he was denied discovery which would have shown that he is being treated far differently than other attorneys charged with similar conduct. He was also denied discovery that would have shown more clearly the link between the actions of disciplinary counsel and the grievance against Gregoire.

ERRORS IN AGGRAVATING FACTORS

Undersigned disagrees with 2.8.2. Under the facts of this case, he was refusing to cooperate with an unconstitutional subpoena in order to protect his client Mr. King. That motive is neither dishonest, nor selfish.

Undersigned disagrees with 2.8.5. Paul Matthew's and Stacy Matthew's are not victims.

Undersigned disagrees with 2.8.6 with respect to the Matthews grievance. He was only an attorney for two years at the time he was retained, with very little experience in criminal defense.

ERRORS IN MITIGATING FACTORS

2.10. Under ABA 9.32 (b) there is an absence of a selfish or dishonest motive.

2.11. Under ABA 9.32(d) there was a good faith and timely effort to have written disclosures made, once he was notified of the problem by a Superior Court Judge.

OBJECTIONS TO CERTAIN FINDINGS ALLEGED IN DISCIPLINARY COUNSEL'S STATEMENT OF FACTS.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

The attorney objects to all proposed findings that were not found by the hearing examiner and the Disciplinary Board as they are based upon credibility findings that were never made by the court below. These include the following.

Page two second paragraph, where the Disciplinary Counsel concluded.

"At the same time, Mr. Matthew's worked in respondent's office on the understanding that the work he did there would offset legal fees. The terms of this transaction, including the rate at which Mr. Matthew's would offset his legal fees, were never reduced to writing."

This proposed finding is irrelevant as it relates to a violation that was never charged.

Page 4, line 3 until page 5, line 1 should be stricken. This involves another theory that was never charged nor found.

Page 5, line 8-10, is a finding not made and disputed.

Page 6, lines 14-17, as these findings were not made, disputed, and incorrect as to the record.

Page 6, lines 18 to page 7, line 3. These are proposed findings that were not made, lifted out of context, and not used as a basis for the finding by the Disciplinary Board.

Page 7, lines 7-15 as these are proposed findings that were not made, disputed, and not used as a basis for the finding by the board.

Page 8, line 1-3 as this proposed findings was not made, irrelevant, and not used as a basis for the finding by the board.

Page 8, lines 9-10 as this proposed finding was not made, based on remarks lifted out of context and not used as a basis for the finding by the board.

Page 8, line 17, to p. 9, line 7 as these findings are irrelevant, based upon remarks lifted out of context and not used as a basis for the finding by the board.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Page 9, lines 9 to page 13, line 12, as these findings are relevant only to the conspiracy charge that was dismissed by the hearing examiner, and likewise was never adopted by the Disciplinary Board.

Page 14, lines 1-3 as this proposed finding was not made and is not relevant to the charges sustained by the Disciplinary Board.

Page 14, lines 14-18 as this is a misstatement of the finding of fact that was actually made.

Page 20, lines 2 through 18 as these were not listed as a basis for the Board's action and are in dispute as to relevance.

ARGUMENT

1. THE LAWYER HAS BEEN DENIED DUE PROCESS AND HIS RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL BECAUSE OF MISCONDUCT OCCURRING BEFORE THE TRIAL.

The lawyer contends that instant proceedings have become a sham. He has filed a number of actions that should have been heard by the disciplinary board, and his motions were short-circuited by the chairman of the Disciplinary Board, who herself has engaged in misconduct by having ex parte contacts with the Disciplinary Counsel.

At the heart of the dispute is the contention of Disciplinary Counsel to demand oppressive depositions and make oppressive discovery requests, without any showing of good cause whatsoever. On the flip side, Disciplinary Counsel has been able to convince the hearing examiner and the Disciplinary Board, that the lawyer is entitled to absolutely no meaningful discovery that would demonstrate he is subjected to disparate treatment in retaliation for bringing charges against the governor, and by implication, the chairman of the disciplinary committee, who misused her position to engage in misconduct on behalf of herself and the governor.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

The lawyer was subjected to unprecedented discovery demands before the hearing took place that are unheard of in the American judicial system. First, Disciplinary Counsel was allowed to take depositions without notifying anyone. Then just days before trial, Disciplinary Counsel made the unprecedented demand that the lawyer search individually through over 250,000 emails that occurred over a four year period to produce every single one that could possibly be related to this action. When the lawyer made a good faith effort to produce the emails in question (none of which were relevant to anything), but explained the obvious, that he could not guarantee that every one had been produced, the hearing examiner made an unprecedented ruling that somehow the lawyer should have been able to assure that every email was produced, because a subpoena had been issued over 4 years ago that somehow put him on notice that this demand would be made in the future. This ludicrous ruling demonstrates that the hearing examiner himself is part and parcel of the same harassment and retaliation that the lawyer has been subjected to.

Meanwhile, the lawyer has been denied the most basic of discovery that he should have been entitled to as a member of the bar association. He has been denied access to the minutes of the disciplinary board and denied access to related public files in this case, under the ludicrous theory that such a request was "oppressive" Incredibly, the hearing officer and Disciplinary Board upheld these objections.

The lawyer has also attempted to have three hearing officers, the Chief Disciplinary Officer, the Chairman of the Disciplinary Board and the Disciplinary Board as a whole, removed for cause because they were witnesses. The lawyer's attempt to have the Chief Hearing examiner removed from the proceedings was to have been ruled upon by the chairman of the Disciplinary Board under ELC 10.2(b)(3). But the chairman of the disciplinary board was also expected to be called as a witness and should not have been allowed to rule on the motion for the Chief Hearing Examiner at the time the motion was filed in June of 1997. In addition, in the

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

summer of 1997, after the motion was filed, she had apparent ex parte contacts with Disciplinary Counsel by hiring joint counsel with Disciplinary Counsel, and then declared in her answer, apparently filed in conjunction with Disciplinary Counsel, that all the lawyer's motions were "without basis in law or fact". Afterhe ruled on the issue in September on 2007, there was no explanation on the record giving reasons for her apparent ex parte contacts with Disciplinary Counsel. Under these circumstances, there was not even a minimum of appearance of fairness and her decisions including a decision on a hearing examiner over which she had no jurisdiction, should be considered void. Similarly, the same holds true for the rest of the Disciplinary Board. Nowhere, have these individuals explained either ex parte contacts nor the appearance of ex parte contacts with the Disciplinary Counsel on a case that is pending before them.

Without a valid ruling on the Chief Hearing Examiner's status, his decision to appoint Parker in the Spring of 2008, should likewise be considered void. In addition, there is the additional issue of whether the Chief Hearing Examiner, after determining that he was unqualified to serve as hearing officer, should be allowed to continue on in the proceedings as Chief hearing officer.

2. NEITHER DISCIPLINARY COUNSEL, THE HEARING OFFICER, NOR THE DISCIPLINARY BOARD HAVE JUSTIFIED THE EXTREME SANCTIONS IN THIS CASE.

In a recent case, the Washington State Supreme Court ruled that disbarment is usually only appropriate in certain cases:

> Disbarment is the most severe sanction. We have historically reserved disbarment for grievous acts of ethical misconduct. Disbarment has generally been applied to four categories of misconduct: (1) the commission of a felony of moral turpitude, **In re Disciplinary Proceeding Against Day**, 162 Wn.2d 527, 173 P.3d 915 (2007) (first degree child molestation); In re Disciplinary Proceeding Against Stroh, 97 Wn.2d 289, 644 P.2d 1161 (1982) (tampering with a witness); **In re Disbarment of Barnett**, 35 Wn.2d 191, 211 P.2d 714 (1949) (bartering narcotics);*fn28 (2) forgery, fraud, giving false testimony and knowing misrepresentations to a tribunal, **In re Burtch**, 162 Wn.2d at 896; **In re**

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 120 P.3d 550 (2005); **In re Guarnero**, 152 Wn.2d 51; **In re Disciplinary Proceeding Against Whitt**, 149 Wn.2d 707, 72 P.3d 173 (2003); **In re Disciplinary Proceeding Against Miller**, 149 Wn.2d 262, 66 P.3d 1069 (2003);*fn29 (3) misappropriation of client funds, In re Schwimmer, 153 Wn.2d 752; **In re Disciplinary Proceeding Against VanDerbeek**, 153 Wn.2d 64, 101 P.3d 88 (2004);*fn30 and, (4) extreme lack of diligence, **In re Disciplinary Proceeding Against Anschell**, 149 Wn.2d 484, 69 P.3d 844 (2003).*fn31 It would be unusual, perhaps unprecedented, to disbar a lawyer who does not have a disciplinary history for misconduct involving a single client in a single proceeding for conduct that lasted approximately two months unless it fell within one of these categories. **In re Disciplinary Proceeding Against Eugster**, No. 200, 209 P.3d 435, 166 Wash.2d 293 (Wash. 06/11/2009)

Without a recommendation of disbarment, the petition filed by Disciplinary Counsel would have no basis, as he is proceeding under ELC 7.2(a)(2).

It should be clear from the arguments raised in this petition, that none of the above categories of misconduct even remotely apply in this case. It should be equally clear, that since the Bar has so far departed from the findings of **Eugster**, that their motive in bringing the ultimate sanction should be presumed to be retaliation and harassment for objecting to their own unethical conduct.

COUNT 1

In count 1, Disciplinary Counsel, the hearing officer and the Disciplinary Board charge that the lawyer violated RPC 1.7(b) because (1) he did not disclose material facts including an explanation of the implications of the risks involved in common representation and (2) and obtain his clients consent in writing.

Disciplinary Counsel's sole evidence that the first element was violated was the testimony of Paul Matthew's. In his questioning, Mr. Busby simply asked if Mr. Matthew's remembered the elements that Disciplinary Counsel thought should be disclosed. What he conveniently overlooked is that it is undisputed that both Mr. And Mrs. Matthew's were

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

questioned by Judge Comstock in detail as to what the judge thought was appropriate disclosure. After this questioning, the judge was satisfied that that appropriate disclosures had been made.

What both the hearing officer, Disciplinary Counsel fail to recognize is the quality of the evidence against the lawyer. Mr. Matthew's readily conceded under cross examination that he could not remember what disclosures were or were not made because of the length of time that had transpired. This is hardly enough to establish by a clear preponderance of evidence that Mr. Matthew's has controverted the testimony of the lawyer that full disclosure was made and this disclosure was in fact approved by a Superior Court judge after extensive questioning. There is no substantial evidence in the record supporting this finding.

Although the undersigned attorney concedes that, as a matter of caution, he should have made these disclosures in writing[5], the fact that he did not, does not automatically translate into a bar violation for which he should be disciplined. RPC 1.7 (b) requires disclosure in writing if there is a "concurrent conflict of interest". See RPC 1.7(a). A concurrent conflict of interest is defined as either (1) the representation of one client will be directly adverse to another client or (2) there is a "significant risk" that that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer.

Disciplinary Counsel appears to argue that, as a matter of law, there is always a concurrent conflict of interest between two criminal defendants. However, the Model Rules he refers to, only speak of a "potential conflict of interest" not a "concurrent conflict of interest". The "potential conflict of interest" is not the law in Washington, only a "concurrent conflict of interest". In Washington, there has to be either representation "will be directly adverse", or a

[5] The lawyer admitted that subsequent to this incident he makes such disclosures about "potential" conflicts of interest to clients in writing..

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

"significant risk" that the representation "will be materially limited". Disciplinary counsel has presented no evidence that either of these last two conditions took place.

This court heard detailed testimony from both the prosecutor and the undersigned lawyer as to how the negotiations transpired. Neither testified that there was any attempt to get Mr. Matthews a lighter sentence at the expense of Mrs. Matthew's. The uncontroverted testimony of the lawyer was that Mrs. Matthew pleaded guilty because of the quality of evidence against her, not because there was an effort to get a lighter sentence for Mr. Matthew's. The testimony of the two defendants as to what had transpired was the same. There was no evidence that the goals of the defendants were not the same. There was no evidence that Mr. and Mrs. Matthew's had confidential information that they needed kept from each other. There was no evidence that one client attempted to shift blame to the other. There was no evidence that either Mr. or Mrs. Matthew's had a different theory of the case. There was no evidence that there were inconsistent defenses presented. There was no testimony that there were discrepancies between the testimony of the two. There was no evidence that the attorneys advice either consciously or unconsciously was colored by his interest in the contingency award. In fact, the only part of the agreement that affected the contingency award was the Alfred plea, which the prosecutor credibly testified she had no interest in withholding. In fact, the Alfred plea was there for the asking.

Therefore there was no evidence that the lawyer's financial interest in the litigation affected in any way the outcome of this case or even if there was a significant risk that it would. In fact, there is no evidence at all that a conflict of interest ever arose on civil litigation, because the interests of Paul and Stacey Matthew's and John Scannell were the same. No one receive any money unless the case was won.

The Rules of Professional Conduct speak to "significant risk" not just a "potential." The fact that the rules in Washington are different from the Model rules is significant. Presumably, if the Washington Supreme Court would have wanted the issue to be only "potential", they would

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

have chosen that language. Not only is there no "clear preponderance of evidence" that a significant risk existed at the time of this concurrent litigation, there is no evidence at all of any risk occurred at any time.

The undersigned attorney testified that he has, as both an attorney and as a non-attorney participated in numerous legal actions where potential risks were not outlined in writing, some involving very prestigious law firms. This suggests that if this is to be the standard, then the rules should be drafted differently. The cases cited by the disciplinary authority are not helpful in this regard. In both **In re Disciplinary Proceeding against Haverson**, 140 Wn.2d 475, 486, 998 P.2d 833 (2000) and **In re Disciplinary Proceeding against Egger**, 152 Wn.2d 393, 411, 98 P.3d 477 (2004), the conflicts of interests cited were either actual conflicts of interest, or conflicts where there was an actual significant risk that was much greater than the potential cited in the case at bar.

Likewise, a search of all published cases involving RPC 1.7(b) have been looked at by the undersigned attorney.[6]. All cases either involved actual conflicts of interest or a "significant risk" of a conflict of interest that "materially limited the representation."

The Washington State Supreme Court presumes any licensed and practicing attorney maintains the high morals of the profession. **In re Discipline of Little**, 40 Wn.2d 421, 430, 244

---

[6] See **In re Disciplinary Proceeding Against Holcomb**, No. 200, 173 P.3d 898, 162 Wash.2d 563 (Wash. 12/20/2007) **In re Disciplinary Proceeding Against McKean**, 148 Wash.2d 849, 64 P.3d 1226 (Wash. 03/06/2003). **In re Disciplinary Proceeding Against Marshall**, No. 200, 157 P.3d 859, 160 Wash.2d 317 **In re Disciplinary Proceeding Against Dennis O. McMullen**, 127 Wash. 2d 150, 896 P.2d 1281 (Wa. 06/29/1995) **In re Disciplinary Proceeding Against Ivan D. Johnson**, 118 Wash. 2d 693, 826 P.2d 186 (Wa. 03/19/1992)

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

P.2d 255 (1952). This presumption is only rebutted when facts are proved beyond a clear preponderance of the evidence. **In re Disciplinary Proceedings Against Allotta**, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). The high court has a constitutional obligation to ensure no attorney is unduly deprived of his property or liberty interests in his professional license. **Bang Nguyen v. Dep't of Health**, 144 Wn.2d 516, 522 n.4, 29 P.2d 689 (2001) ("[A] professional license represents a property interest to which due process protections apply."). Challenged findings of facts must be supported by substantial evidence, which incorporate this heightened burden of proof. **In re Disciplinary Proceedings Against Poole**, 156 Wn.2d 196, 209, 125 P.3d 954 (2006). Nevertheless these findings cannot be conclusory, but must set forth specific facts demonstrating a clear violation of the Rules of Professional Conduct. Id.

Disciplinary counsel does not propose a finding that shows how the interests of Stacey Matthew's, Paul Matthew's, or Scannell conflicted in any way or how there was a "significant risk" that "materially limited the representation." The Washington State Supreme Court has found conflicts when an attorney represents a party with opposite interests to a client, a third party, or himself. See **In re Disciplinary Proceeding Against McKean**, supra; **Eriks v. Denver**, 118 Wn.2d 451, 460, 824 P.2d 1207 (1992). But here the interests of Paul Matthew's, Stacey Matthew's, and John Scannell were alligned. There is absolutely no evidence that Paul Matthew's, or Stacey Matthew's had any different ideas on how the case should proceed or that there was any risk that the representation was compromised. In fact, the evidence demonstrates that the decision by the defendants to hire the defendant was a good decision which paid off because they were able to obtain advice that would not have been obtained through a public defender. They hired Mr. Scannell to protect their interests in another lawsuit, and he was able to do so through the use of the Alfred plea. For this he should be praised, not condemned.

With respect to the issue as to whether a violation of this count would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

public interest, there is absolutely no evidence that it does. The undersigned attorney testified that he has since made written conflict statements to cases where multiple representation exists so a violation here should not be used as a basis for immediate suspension.

Count 2

Of the multiplicity of arguments advanced by Disciplinary Counsel as to why the lawyer impeded the Matthews investigation, the hearing examiner and Disciplinary Board found only two. In doing so, the hearing officer rejected Disciplinary Counsel's arguments that he impeded the investigation by not giving answers the disciplinary counsel wanted. This is further evidence of improper motive. As to the hearing examiner and Disciplinary Board findings, the lawyer responds as follows.

1. The alleged frivolous deferral request.

Disciplinary Counsel and the hearing officer claim that the deferral request was "frivolous." However, the undersigned attorney credibly testified that the two cases in question were closely related to each other as well as Scannell's representation because King was attempting to use a default judgment in the first case to attach the proceeds from the second case. He also testified that there was a race between the two to obtain the money and that it was decided by a matter of minutes. His reason for delaying the investigation was simply to prevent the bar association from interfering from this litigation by inadvertently disclosing information that would either hinder or aid one of the parties, or worse, causing a potential conflict of interest becoming an actual conflict of interest, which would have required the attorney to withdraw from representing both clients. Since Scannell represented Mr. King on numerous other cases and because he represented Mr. Matthew's significant wage claim, to problems created by withdrawing from those cases would have been monumental for all parties.

Also, this court should take judicial notice of the treatment of the undersigned attorney as compared to Gregoire. There was far less reason to grant Gregoire a deferral on two of the three

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

charges than in this case. Yet Gregoire was able to get an indefinite deferral which prevented any meaningful investigation until this day. According to a sworn declaration submitted by the undersigned attorney, there aren't even any files left as they have been destroyed. So in one case, a powerful political figure was able to request a deferral and avoid any investigation at all. In the instant case, a deferral request that was clearly more substantive has become a reason for disbarment. If the undersigned counsel is immediately suspended for actions the governor likewise committed to avoid investigation at all, would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest.

2. The alleged frivolous motion to terminate.

The lawyer replied to a subpoena, which Disciplinary Counsel claims is legal under ELC 5.5, by filing a motion to terminate the deposition under ELC 5.5 and CR 30(d).

The hearing officer makes a finding that the objections were "frivolous" without stating which of Disciplinary arguments were sustained. Therefore the lawyer will respond to all arguments raised by Disciplinary Counsel.

First, Disciplinary Counsel faults the undersigned by not objecting to the subpoena before the day of the deposition. However, as explained by the undersigned at trial, there are no provisions in the ELC to file a protective order for an ELC 5.5 deposition under CR 26(c). As Disciplinary Counsel himself will argue, the Civil rules do not come into play until charges have been brought under ELC 10.1(a). Since this is a precharging deposition the only way to contest a deposition brought under ELC 5.5 is to file a motion to terminate the deposition on the day of the deposition pursuant to CR 30(d). So Disciplinary Counsel appears to contend by simply bringing a motion under CR 30(d), the only method available, one is guilty of violating the Rules of Professional Conduct. This argument is absurd on its face.

Then, Disciplinary Counsel appears to argue that by disagreeing with the Disciplinary Counsel's view of what is oppressive, one is guilty of misconduct by converting that

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

disagreement into a motion to terminate the deposition. In other words, it is up to the Disciplinary Counsel to determine what is oppressive, and if he determines the it is not, then the undersigned is guilty of a bar violation for challenging Disciplinary Counsels viewpoint. If this type of finding is used to suspend the undersigned, this would give immense power to Disciplinary Counsel to crush a legitimate defense to a bar complaint. This would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest.

The subpoena was oppressive on its face. It made the ludicrous demand that the undersigned produce documents that Disciplinary Counsel knew did not exist.

Next, the subpoena was designed to harass the plaintiff over issues that are ludicrous on their face. Neither the disciplinary review committee nor the hearing officer made any kind of finding that Disciplinary Counsel's theory that someone occasionally working on a computer translates into a bar violation. There is no case law in Washington which supports the contention that a transaction such as this, (informally having a client work on computers) is a "business transaction." Past cases involving business transactions do not involve transactions even remotely similar to the one at issue here.[7]

Without support in case law, one is left to search for possibly analogous rulings. The RPC governing gifts does not forbid attorneys from accepting gifts from clients. RPC 1.8(c). **In**

[7]. Attorney obtaining interest in a $192,000 Certificate of Deposit is a business transaction. **In re Disciplinary Proceeding Against Miller**, 149 Wash.2d 262, 66 P.3d 1069 (Wash. 04/24/2003). Attorney obtaining two loans totaling $40,000 is a business transaction. **In re Disciplinary Proceeding Against Dennis O. McMullen**, 127 Wash. 2d 150, 896 P.2d 1281 (Wa. 06/29/1995) $25,000 loan is a business transaction. **In re Disciplinary Proceeding Against Paul G. Gillingham**, 126 Wash. 2d 454, 896 P.2d 656 (Wa. 06/08/1995). $20,000 loan is a business transaction. **In re Disciplinary Proceeding Against Ivan D. Johnson**, 118 Wash. 2d 693, 826 P.2d 186 (Wa. 03/19/1992). Attorney Withdrawing $11,128.25 from a trust account to form a company with a client is a business transaction. **In re Disciplinary Proceeding Against McKean**, 148 Wash.2d 849, 64 P.3d 1226 (Wash. 03/06/2003).

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

re Disciplinary Proceeding Against Paul G. Gillingham, 126 Wash. 2d 454, 896 P.2d 656 (Wa. 06/08/1995).

Finally, since the facts in the Matthew case was largely undisputed, neither the hearing officer nor the Disciplinary Counsel, nor the Disciplinary Board have explained why a deposition was even necessary. Disciplinary Counsel claims that the fact that the deposition only lasted 65 minutes proves that it was not oppressive. What he leaves out is what valuable information did he glean from this supposed necessary deposition? The answer was nothing. The facts in this case were not in dispute. It does not take 65 minutes to determine the non-existence of two documents you have been told do not exist. It does not take a deposition to determine that someone who volunteers to work on a computer is not a "business transaction" of the type contemplated by the RPC's as least with respect to how it has been interpreted in the past. If there was some kind of valuable information that was obtained during this meaningless deposition, then what was it? Significantly, Mr. Busby did not enter the deposition into evidence. That speaks volumes on how necessary it was.

Count 4

As before, Disciplinary Counsel charged misconduct that was apparently not used by the Hearing Examiner as a basis for sustaining the charge. Failure to file a prompt response will not be addressed as it was not sustained by the hearing officer.

1. Failure to Comply with a discovery request

In this allegation, the Disciplinary Counsel failed to comply with a discovery request by announcing he was bringing a motion to terminate the deposition. As argued earlier, this is the only valid method for challenging the deposition.

It is the contention of the lawyer that ELC 5.5 is not a blanket authorization for disciplinary counsel to engage in a fishing expedition. It is also not authorization for Disciplinary Counsel to obtain attorney client privileged information from an attorney who is

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

representing another attorney before the bar association. By failing to disclose what violation was being investigated, and by claiming the Disciplinary Counsel could not claim attorney client privilege, Disciplinary Counsel gave full indication that this was simply another attempt to harass the lawyer, as he had also done on the Matthews grievance.

2. The alleged frivolous motion.

Disciplinary Counsel and the hearing officer fault the lawyer because he could cite no authority for challenging the scope of an ELC 5.5 deposition. The undersigned argues that it is impossible to cite authority for such a proposition because there has been no litigation defining what the valid scope of an ELC 5.5 deposition[8].

Disciplinary Counsel apparently argues that there is no limit. There does not have to be any charges defined, so presumably the scope of the deposition is unlimited. It is up to the deponent to guess what the deposition might be about, and therefore, it is permissible for disciplinary counsel to engage in a fishing expedition to question the deponent as to whatever disciplinary counsel may be curious about. However, he has cited no authority that such a deposition is allowed under our judicial system.

In addition, the nature of the questioning indicated that Mr. Busby had every intention of forcing the deponent to reveal attorney client information in his representation of Mr. King. The hearing officer made a finding that there was an "assumption" by the lawyer that questioning would involve another attorney who had not been notified. It is hard to conceive how the questioning would not involve King, when the very nature of the charge is that the lawyer aided Mr. King in the practice of law.

All of these issues are important ones and involve issues of first impression that have yet to be decided by the Washington State Supreme Court. To immediately suspend an attorney who

[8] ELC 5.5 has only been in existence since October 1, 2002.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

has attempt to challenge this power grab would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest.

4, 5, 6,7,8 The alleged willful disobedience of an order, failure to comply with discovery, and frivolous objection

Disciplinary Counsel then argues that the Respondent's first motion was denied citing Ex 421. But exhibit 421 was signed by the chairman of the Disciplinary Board without consulting the rest of the board. Disciplinary Counsel has cited no authority as to why the chair of the disciplinary board has authority to rule on this motion.

Based upon his conversations with Mr. King, Scannell requested proof of service that King was notified of the deposition. Ex 433, p. 4, Disciplinary Counsel apparently takes the position that he is not bound by CR 30 with respect to notifying parties to the taking of a deposition. He has never been able to explain why this does not violate **State v. Miles**.

Acting upon the "order" issued by the previous Chair of the Disciplinary Counsel, Disciplinary Counsel issued another subpoena to Scannell, this time not giving notice to Mr. King. Another motion for protective order was filed. This time Gail McMonagle issued an "order" on behalf of the Bar. Scannell complained through a motion for reconsideration that she did not have authority but his motion was denied with another "order." Scannell and Mr. King have since filed suit challenging the legality of the orders issued by the Chairs of the Disciplinary Committee as well as the constitutionality of conducting depositions without giving notice to the targets of the investigation. This suit was recently dismissed by the Washington State Supreme Court without a finding on the merits. The Court of Appeals and Supreme Court ruled that the Superior Court did not have jurisdiction to hear the dispute. Supreme Court No. 83205-6, Court of Appeals No. 60623-9-I However, neither Disciplinary Counsel, the hearing officer, nor the Disciplinary Board itself has ever been able to address the issue of how the

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Disciplinary Chair can act on behalf of the Board, when there is no authority under the rules or in published precedents.

Disciplinary Counsel's actions of taking depositions without providing notice to anyone violate both the federal and state constitution as well as the civil rules. First, since Disciplinary Counsel provides no notice of the deposition, there is no way for anyone that has standing to protest the scope of the deposition. CR 30(h)(2)(3)(4) give the parties the right to object and instruct the witness not to answer if the taking of the deposition becomes oppressive. Here, Mr. Busby, avoids this requirement by not letting the parties attend, thus giving him the power to oppress and harass with impunity and without due process.

Disciplinary Counsel attempts to evade these due process requirements by claiming that somehow Mr. King and Scannell are not "parties." By doing so, he ignores the phrase "to the extent possible, CR 30 or 31 applies to depositions under this rule." Furthermore, if Disciplinary Counsel were correct, there would be nothing to prevent him from issuing subpoenas for whatever reason he wanted, even if it meant denying rights guaranteed under the federal or state constitution. It is well established that when a statute is subject to two interpretations, one constitutional and the other unconstitutional, the court will presume the legislature intended a meaning consistent with the constitutionality of its enactment. **Treffry v. Taylor**, 67 Wash. 2d 487, 408 P.2d 269 (1965); **Martin v. Aleinikoff**, 63 Wash. 2d 842, 389 P.2d 422 (1964). The same principle should hold true for the civil rules.

Secondly, by not notifying the parties of the deposition, Disciplinary Counsel denies them the right to cross examine the witnesses. It is axiomatic that the right to call and examine witnesses is fundamental to the due process required by the Fourteenth Amendment and by Article I Section 3 of the Washington Constitution. **Flory v. Dept. of Motor Vehicles**, (1974) 84 Wash. 2d. 568, 571, 527 P. 2d. 1318 citing **Goldberg v. Kelly**, (1970) 397 U. S. 254, 25 L. Ed. 2d. 287, 90 S. Ct. 1011, the minimum requirements of a due process hearing include the right

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

to confront adverse witnesses, to present evidence, and to representation by counsel. **Goldberg** at 397 U.S. 268 found:

. . . and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

As it is similar to the language of the Sixth Amendment, "confronting adverse witnesses" clearly means to cross exam such witnesses in the presence of the trier of fact. Please see **Crawford v. Washington**, (2004) 541 U.S. 36, 158 L. Ed. 2d. 177, 124 S. Ct. 1354. "[P]resenting his own . . . evidence orally" clearly means to call witnesses and to direct and cross examine them in the presence of the trier of fact.

Absence of such opportunity to cross examine adverse witnesses and to present own witnesses is fatal to the Constitutional adequacy of such procedures, **Goldberg**, at 397 U.S. 268. **Goldberg** involved an administrative termination of welfare benefits.

Here, Disciplinary Counsel is insisting on the right to subpoena and examine witnesses through power of subpoena, without giving the respondent lawyers a similar right. By denying them the right to cross examine, the deposition is one sided and biased.

Here, Disciplinary Counsel went to a review committee with a one sided deposition of a potentially hostile witness, (Mr. Maurin), without even providing counsel with all the exhibits, or an opportunity to cross examine the witness. This has now subjected the undersigned to the time and expense of a lengthy trial, without ever having the opportunity to cross examine or even call the witness for a deposition.

The undersigned also contends that holding depositions without notice violates the State Constitution, even if these actions do not violate the Federal Constitution.

A party who seeks to establish that the state constitution provides greater protection than the United States Constitution must engage in the six-factor analysis set forth in **State v. Gunwall**, 106 Wn.2d 54, 720 P.2d 808 (1986). A party is relieved of performing a Gunwall

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

analysis only when an analysis in a previous case has determined that a 'provision of the state constitution independently applies to a specific legal issue'. **State v. Ladson**, 138 Wn.2d 343, 348, 979 P.2d 833 .

For the purposes of this response which is to show that immediate suspension should not be taken, the undersigned attorney refers the court to its prior holding in **State v. Miles** reserving the right to make a full Gunwall analysis as well as a Federal analysis in his opening brief.

Under ELC 7.2(2), the undersigned lawyer must make an affirmative showing that his continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest. Here the bar proposes to disbar, not because of the underlying charges, but because they do not like the way he presents his case and his exposure of misconduct by the Board. It is hard to see how this serves the public interest. As can be seen from the attached declaration, a significant portion of this attorneys practice is serving the homeless community, who cannot obtain representation elsewhere. How can this serve the public interest?

As can be seen from these arguments, it would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest to immediately suspend the undersigned counsel for challenging an unconstitutional subpoena and for exposing misconduct by the Board itself..

CROSS PETITION

COMES NOW, John Scannell, pro se, and respectfully prays the Court for a writ of prohibition addressed to Scott Busby and all disciplinary counsel for the Washington State Bar Association, directing them to refrain from conducting secret depositions concerning John

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Scannell without giving notice to him or his clients. This petition is based upon the attached declaration of the petitioner.

In the alternative, the petitioner seeks a writ of mandamus compelling Board Member Stiles to properly process motions for protective order on pre-charging depositions by either forwarding them to the chief hearing officer of the disciplinary board or to the disciplinary committee as a whole.

In the alternative, the petitioner seeks the court to review the decision of the disciplinary board in the event the court construes the decision of the Disciplinary Vice Chair as the decision of the Disciplinary Board. The petitioner also seeks a declaratory judgment declaring ELC 5.5 to be null and void.

The petitioner also seeks an injunction preventing the Disciplinary Board from conducting depositions pursuant to ELC 5.5 without giving notice.

The petitioner seeks an order, writ of prohibition, and/or injunction against the entire disciplinary board in both their individual and official capacity from participating in any grievance filed against John Scannell.

The petitioner seeks an order, writ of mandamus, and/or injunction compelling the Disciplinary Board to forward to a conflicts review officer any allegations of misconduct by the petitioner.

Petitioner declares as follows:

I. JURISDICTION, VENUE AND PARTIES

1.1 This court has jurisdiction over the parties and the subject matter of this litigation pursuant to the fact that this case involves lawyer discipline, which the court has previously ruled is the exclusive jurisdiction of the Supreme Court and cannot be heard in Superior Court

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

1.2 Petitioner, John Scannell (hereinafter referred to as "Petitioner"), is an attorney in King County, Washington.

1.3 Respondent, Washington State Bar Association and the Washington State Bar Association Disciplinary Committee are located at, and do business in, King County Washington.

1.4 Respondent Scott Busby is a Disciplinary Counsel for the Washington State Bar Association.

1.5 Respondent Stiles is the chair of the Disciplinary Board.

1.6 The other respondents are members of the Disciplinary Board.

FACTS

2.1. Petitioner realleges Paragraphs 1.1 through 1.6 of this Complaint as if fully stated herein.

2.1B. In 2001, the petitioner filed a grievance against Christine Gregoire, who is now the governor of the State of Washington. In this grievance the petitioner charged that Ms. Gregoire was negligent in supervising her subordinate Janet Capps who failed to file a notice of appeal in a timely fashion, which cost the taxpayers the right to have a $17 million appeal heard. (See Capps v. Gregoire, 115 Wash.App. 1006 (Wash.App.Div.1 01/13/2003)

This case will hereinafter be referred to as the "Beckman case". The Disciplinary Board at the time held a press conference claiming they were going to investigate Ms. Capps, ignoring confidentiality rules which normally would have protected the subordinate. The petitioner filed more grievances against Ms. Gregoire on another case, unrelated to the Beckman case, where she committed a similar violation. Ms. Gregoire requested and the Disciplinary Board granted, an indefinite stay of the investigation of the grievance. Attached is a true and correct copies of the correspondence between counsel and the Disciplinary Board.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

2.1C. Unbeknownst to the petitioner, the chairman of the disciplinary was Loretta Lamb who was co-counsel and supervising attorney of Ms. Capps.

2.1D Immediately upon the filing of the complaint, the Disciplinary Board and/or Disciplinary Counsel began harassing the petitioner by making unjustified demands for records and otherwise harassing him by investigating and charging for grievances that the Board normally doesn't care about. Eventually, over 30% of the petitioner's practice was spent dealing with unjustified investigations.

2.2 John Scannell is an attorney for Paul King, in actions before the Washington State Bar Association Disciplinary Committee.

2.3 Scott Busby, a Disciplinary Counsel for the Washington State Bar Association has conducted at least one pre-charging deposition investigating either the petitioner or his client Paul King without notifying either of them of the depositions.

2.4 Scott Busby has attempted to conduct pre-charging depositions of John Scannell without notifying Paul King, even though potential charges against Paul King were being investigated. Scott Busby has indicated that he would ask attorney client privileged information and asserted that Scannell would not be able to assert attorney client privilege. John Scannell has no way of determining whether Mr. King intended to waive any attorney client privileged communications and therefore needed Mr. King's presence in order to answer questions. Scott Busby has indicated by his interpretation of the rules that Mr. King is not entitled to notice and therefore not entitled to attend the deposition. Thus the ELC became a defacto way for the bar association to investigate attorneys who represent clients before the bar association, forcing them to reveal attorney client privilege, and making it impossible for attorneys to get proper representation before the Disciplinary Board.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

2.5 John Scannell attempted to file for protective orders on these depositions. The motions were to have been considered under the ELC rules by either the chief hearing officer or the disciplinary committee as a whole. He has been denied this right on at least two occasions.

2.5 The disciplinary chair has ruled on the latest motion herself instead of referring the motions to the correct persons.

2.6 ELC 5.5, as presently interpreted by the defendants, is unconstitutional under both the state and federal constitution, as it does not allow for due process to contest the validity of the depositions.

2.7 ELC 5.5 as presently interpreted by the defendants is unconstitutional under Article I, Section 7 of the Washington State Constitution.

2.8 The pre-charging subpoenas are void because they fail to state a claim for which relief can be granted.

2.9. When the petitioner could not get the board to properly respond, he filed suit in King County Superior Court.

2.10 At the time the suit was filed, defendant Busby had already began to retaliate against the defendant by bringing charges over his motions for protective orders.

2.11. Even though these charges were pending before the disciplinary board, the Disciplinary Board hired joint counsel with the prosecutor, who was defendant Busby.

2.12. Without hearing from a single witness, or reading a single legal brief, the Disciplinary Board unanimously concluded that the Petitioners grievances were without merit in law or fact.

2.13 By having joint counsel with defendant Busby, the Disciplinary Board committed misconduct by violating the constitutional rights of the petitioner in at least three ways. First by having joint counsel they violated well established precedents forbidding a judge from having joint counsel with an attorney who appears before them. Second, by arriving at a joint response

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

with the defendant Busby, they arrived at decisions by either having ex parte contacts, or the appearance of ex parte conducts with an attorney that was appearing before them. Third, by publicly declaring the petitioner's grievances without merit in law and fact they prejudged a case that was pending before them.

2.14. When the petitioner filed numerous motions to disqualify because of the above misconduct, the Disciplinary Board either ignored the motions or only gave them cursory consideration, almost as an afterthought. At no point did they refer these grievances to the conflicts review officer, even though it is a requirement of ELC 2.7.

2.15. In retaliation for the petitioner protesting the misconduct of the Disciplinary Board and in retaliation for representing another attorney before the Disciplinary Board, the Disciplinary Board has voted to disbar the petitioner, using standards that are unheard of in the previous history of the Disciplinary Board.

2.16 Meanwhile, the Disciplinary Board has refused to investigate Gregoire or her subordinates in any meaningful fashion, instead destroying all files connected with the grievance.

CAUSE OF ACTION #1, DECLARATORY JUDGMENT

3.1 Petitioner realleges Paragraphs 1.1 through 2.16 of this Complaint as if fully stated herein.

3.2 The petitioner has been subject to unconstitutional depositions without due process in violation of the Washington State Constitution and the United States Constitution. There is the constant threat of continuing to be subject to unconstitutional subpoenas

3.3 The petitioner has been subjected to unconstitutional invasions of his private affairs under Article I Section 7, of the Washington State Constitution.

3.4 The petitioner has been subjected to subpoenas without authority of law.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

3.5 The petitioner has no other plain, speedy, or adequate remedy at law.

CAUSE OF ACTION #2, WRIT OF PROHIBITION

4.1 Petitioner realleges Paragraphs 1.1 through 3.5 of this Complaint as if fully stated herein.

4.2 Scott Busby has been conducting secret depositions without notifying parties and without adequate safeguards to protect attorney client privilege without due process.

4.3 Scott Busby has failed to join necessary parties in conducting pre-charging depositions.

4.4 ELC 5.5 is unconstitutional as it does not allow for protective orders to contest the validity of subpoenas because the parties are not given adequate notice.

4.5 ELC 5.5 is unconstitutional as it allows the Disciplinary Counsel to conduct investigations which invade the private affairs of the petitioner.

4.6 The petitioner has no other plain, speedy, or adequate remedy at law.

CAUSE OF ACTION #3, WRIT OF MANDAMUS

5.1 Petitioner realleges Paragraphs 1.1 through 4.6 of this complaint as if fully stated herein.

5.2 As a result of the unlawful actions of disciplinary chair the petitioner has been denied his right to have his motion to terminate or limit a deposition heard as allowed by the ELC 5.5(a) and CR 30.

5.3 The petitioner has no other plain, speedy, or adequate remedy at law.

CAUSE OF ACTION #4, PROTECTIVE ORDER UNDER ELC 5.5

6.1 Petitioner realleges Paragraphs 1.1 through 5.3 of this complaint as if fully stated herein.

6.2 Petitioner seeks a protective order as allowed in ELC 5.5.

CAUSE OF ACTION #5 INJUNCTION

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

7.1 Petitioner realleges paragraphs 1.1 through 6.2 of this complaint as if fully stated herein.

7.2 Scott Busby appears willing to conduct further deposition without due process.

7.3 The petitioner has no other plain, speedy, or adequate remedy at law.

CAUSE OF ACTION #6 WRIT OF PROHIBITION

8.1 The court should issue a writ ordering the defendants to refrain from conducting any more investigations or hearings against the petitioner because of their past misconduct.

CAUSE OF ACTION #7 INJUNCTION

9.1 The petitioner is suffering from irreparable harm because of the willful and deliberate misconduct by the defendants as above alleged as the Supreme Court has granted them immunity from their misconduct. The petitioner will also be forced to participate in a lengthy and expensive trial without having the benefit of proper discovery..

7.3 The petitioner has no other plain, speedy, or adequate remedy at law.

PRAYER FOR RELIEF

8.1 Petitioner seeks a writ of prohibition ordering respondent, Scott Busby, to desist from conducting aforementioned depositions.

8.2. Petitioner seeks a declaratory judgment declaring that ELC 5.5 is unconstitutional and therefore is null and void.

8.3 In the alternative petitioner seek a mandamus ordering chairperson, Mr.. Stiles, to process protective order motions properly.

8.4 Petitioner seeks a protective order requiring the Disciplinary Counsel to refrain from conducting depositions without joining the affected parties to the action

8.5 Petitioner seeks an injunction barring the defendants from conducting pre-charging depositions pursuant to ELC 5.5.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

8.6 Petitioner seeks and injunction preventing the Disciplinary Board or Disciplinary Counsel as presently constituted from participating in any grievances filed against the petitioner or conducting any hearings.

8.7 Petitioner seeks an injunction preventing the hearing examiner from conducting any hearings.

Petitioner seeks any other relief the court may deem just and equitable.

DATED this 5th day of November, 2009.

/S/
John Scannell, pro se

DECLARATION

Undersigned declares as follows.

1. I have read the foregoing petition, have personal knowledge of its contents and events therein and declare them to be true.

2. Attached are true and correct copies of the correspondence between the Board and I concerning my grievance against Christine Gregoire. Recently, when I requested copies of the file for this grievance, I was told by Disciplinary Counsel, Linda Eide, that the files were destroyed after 3 years and no longer exist.

3. Attached is a true and correct copy of the motion filed in Scannell et al v. King, King County case No. 06-2-33100-1 SEA and was filed shortly after the defendants were served.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

4. The name of my firm is ActionLaw.net. Its primary location is in the International District of downtown Seattle, although there are branch offices elsewhere that access the main server. This firm performs work in the fields of labor law, civil rights, landlord tenant, traffic tickets, and personal injury. At the present time, I am a sole practitioner with most of the cases being contingency or flat fee. A significant proportion of my client is homeless, who come to me because no other attorneys will take their cases. I fear that these clients will become permanently disenfranchised if I am suspended, and therefore do not believe this disciplinary action serves the public interest at all.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated November 5th, 2009.

John Scannell

ARGUMENT IN SUPPORT OF CROSS PETITION

A. THERE IS AN INHERENT CONFLICT OF INTEREST BETWEEN THE MEMBERS OF THE DISCIPLINARY COMMITTEE AND THE RESPONDENT LAWYER DUE TO THE EXISTENCE OF A PRE-EXISTING LAWSUIT.

Disciplinary Counsel may try and argue that the Disciplinary Committee may not have to recuse because an automatic recusal cannot be had by the simple act of suing the judge, citing, as he has in the past, **United States v. Studley**, 783 F.2d 934, 940-41 (9th cir. 19866); **Ronwin v. State Bar of Arizona**, 686 F.2d 692, 701 (9th Cir. 1981), **Hoover v. Ronwin**, 466 U.S. 58, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); **United States v. Grismore**, 564 F.2d 929, 933 (10th Ciir.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

1977), cert. Denied 435 U.S. 954 (1979). :**United States v. Pryor**, 960 F.2d 1,3 (1st Cir. 1977), cert. Denied, 435 U.S. 954 (1978). However, this case is distinguishable from each of those suits as the suit filed by the respondent lawyer was filed well before the conflicts of interests arose, and the suit itself is a good faith attempt to resolve an unprecedented issue.

In addition, there are other reasons that distinguish this case from the above. By hiring joint counsel with the prosecutor, and then prejudging the case on the basis of an investigation conducted by the prosecutor, the disciplinary has shown bias in this case.

B. WHEN THE PROSECUTION OF THE RESPONDENT ATTORNEY BECOMES INTERTWINED WITH THE INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS OF THE COURT, A DUE PROCESS AND/OR AN APPEARANCE OF FAIRNESS VIOLATION HAS OCCURRED.

A leading case on this issue is **Washington Medical Disciplinary Board v. Johnston**, 29 Wash. App. 613, 630 P.2d 1354 (Wa.App. 06/23/1981), where it was held that if the prosecution became connected with the investigative and adjudicative roles of an agency, a due process violation might result:

In contending that the Disciplinary Board violated due process, Johnston argued that the Board impermissibly acted as investigator, prosecutor, and judge against him. This combination of functions, according to Johnston, deprived him of a fair and impartial hearing. See generally 3 K. Davis, Administrative Law § 18 (2d ed. 1980).

In response the Disciplinary Board relied heavily, as did the Superior Court, on **Withrow v. Larkin**, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975), where the Supreme Court upheld a Wisconsin statute concerning discipline of doctors even though the agency played both an investigative and adjudicative function.

While conceding that combining the investigative an adjudicative function does not necessarily lead to a due process violation, the Washington high court in **Johnston** stated that a different result would occur if there was a commingling of the prosecutorial function citing

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

Huber Pontiac, Inc. v. Allphin, 431 F. Supp. 1168 (S.D. Ill. 1977), vacated on other grounds sub nom. **Huber Pontiac, Inc. v. Whitler**, 585 F.2d 817 (7th Cir. 1978). More importantly, the court ruled that a violation of the appearance of fairness doctrine occurs.

> We note initially that the appearance of fairness doctrine applies to proceedings such as those conducted by the Disciplinary Board. Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n, 87 Wash. 2d 802, 557 P.2d 307 (1976); Stockwell v. State Chiropractic Disciplinary Bd., 28 Wash. App. 295, 622 P.2d 910 (1981). The purpose of this doctrine was clearly enunciated many years ago:
>
> The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgement of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in People v. Suffolk Common Pleas, 18 Wend. 550:
> "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."
> **State ex rel. Barnard v. Board of Educ.**, 19 Wash. 8, 17, 52 P. 317 (1898). Thus, even a mere suspicion of irregularity or an appearance of bias or prejudice must be avoided. **Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n, supra** at 809.
>
> Applying the doctrine to this case, we are compelled to hold that a disinterested person would be reasonably justified in thinking that partiality may have existed. See Swift v. Island County, 87 Wash. 2d 348, 552 P.2d 175 (1976). There is no real dispute that Board members were actively involved in investigating the charges against Johnston. At the first hearing regarding the suspension of Johnston's license, the chairman of the Board stated "that the Board is quite thoroughly conversant with all the factors that have led up to this

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

hearing." Board members, as noted above, had reviewed investigative reports prepared by the staff of the Board and the letters of complaint from Drs. Mack and Sandstrom. The formal charges against Johnston were issued over the name of the secretary of the Board, who also sat as a Board member in the adjudication of the charges. One member went so far as to discuss the case privately with a key witness, Mack, prior to these proceedings. These same Board members ultimately determined whether Johnston's license should be revoked. Although this combination of the investigative and adjudicative functions, as discussed above, does not amount to violation of due process, nevertheless, it allows the Board to act as accuser and judge in the same proceedings. As the Supreme Court stated in State ex rel. Beam v. Fulwiler, 76 Wash. 2d 313, 315-16, 456 P.2d 322 (1969):

> Despite the integrity of the respective members of the commission, and their undoubted desire to be objective in their appellate disposition of the matter, it is highly unlikely, under the unusual circumstances prevailing, that the respondent or anyone in a like situation could approach or leave a hearing presided over by a tribunal so composed with any feeling that fairness and impartiality inhered in the procedure. See also **Loveland v. Leslie**, 21 Wash. App. 84, 583 P.2d 664 (1978).

In addition to this combination of functions, an aspect of the Board's proceedings which, we do not deem dispositive, yet worthy of comment, raises the specter of unfairness. Throughout these proceedings the one assistant attorney general assigned to the Board acted in a dual capacity as legal adviser to the Board and prosecutor. Although this dual capacity is specifically authorized by RCW 18.72.040, we believe performance of the two roles by the same individual is inherently inconsistent and thus creates the possibility of disproportionate influence with the Board.

The Board's response to this issue is that the appearance of fairness doctrine is not violated if due process is not violated. We do not believe, however, that the broad language contained in the cases supports this argument. See Vache, Appearance of Fairness: Doctrine or Delusion, 13 Willamette L.J. 479, 487 (1977). Further, traditional due process analysis focuses on the possibility of actual bias or prejudice. See, e.g., **Withrow v. Larkin**, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975); **Tumey v. Ohio**, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243 (1927); **FTC v. Cement Inst.**, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948). The appearance of fairness doctrine, however, clearly focuses on the possibility of the appearance of bias or prejudice. **See Narrowsview Preservation Ass'n v. Tacoma**, 84 Wash. 2d 416, 526 P.2d 897 (1974); **Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n**, supra.

In conclusion, we feel compelled by our holding to discuss future proceedings. By our decision we do not hold that all Disciplinary Board proceedings, as currently conducted, are invalid. We note that as presently enacted the statute governing the Disciplinary Board provides for the appointment of pro tem members for the purpose of participating in disciplinary proceedings.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

> RCW 18.72.135. As we read the current statute, the problems inherent when the Board members who investigate charges are the same members who ultimately act as decision makers can be avoided by the convening of separate panels to investigate and adjudicate specific charges. Such a procedure is an alternative method of eliminating the inconsistent nature of the assistant attorney general's dual capacity, as he or she would be acting as adviser to one panel and prosecutor to a separate panel.
>
> We also wish to emphasize that by our decision we are not questioning the ability of doctors to act in a quasijudicial capacity. Our review of the record, which consists almost entirely of highly technical medical testimony, confirms the wisdom of the legislature's decision to place responsibility for the discipline of doctors on members of the medical profession. Clearly, fellow physicians have the requisite expertise and experience to understand best the appropriate standards to which all doctors must adhere. Nor do we mean to impugn the integrity of the Board members involved in this case. As we noted above, see footnote 9, supra, our focus must be directed toward the appearance of impropriety; our remarks should not be construed as implying that actual impropriety occurred.

Here, as argued earlier, there is an appearance of ex parte contacts between the hearing examiner and the prosecutor, Mr. Busby, who have had joint representation with him in a previous court hearing concerning the very issues that are before the Disciplinary Board now. This co-mingling of prosecutorial and adjudicative functions is even worse than in **Johnston** and should now be allowed to stand. Recusal and/or dismissal of charges would be the only remedy of a violation of this magnitude.

C. THE APPEARANCE OF AN APPARENT EX PARTE CONTACTS BETWEEN DISCIPLINARY COUNSEL, THE HEARING EXAMINER IN ANOTHER CASE, AND INDIVIDUAL MEMBERS OF THE DISCIPLINARY COMMITTEE HAS TAINTED THIS CASE TO THE POINT THAT DISMISSAL OF ALL CHARGES IS WARRANTED.

While the rules allow for an appeal of a hearing examiner's decision to a disciplinary review committee, the existing conflicts of pre-existing lawsuits coupled by apparent ex parte contacts between disciplinary counsel, members of the disciplinary committee, and a previous hearing examiner through joint representation through the same attorney have rendered such an appeal impossible.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

The hearing examiner involved in the previous lawsuit did not even address the issue of an apparent ex parte contact that necessarily occurred when there was joint representation by the same counsel in the previous litigation. Neither have individual members of the review committee when they were assigned this case as well as another case that involves the attorney.

At a minimum, these decision-makers should have put on the record the nature of the representation and the existence of any chinese walls. By not doing so, there now is a clear presumption of ex parte contact that has not been addressed. Disciplinary counsel claims that any litigant could sabotage his own prosecution ignores the simple remedy of having the Bar appoint separate counsel for the hearing examiner and the Disciplinary Board which would have easily resolved the issue.

The Disciplinary Board are acting as appellate judges in a matter that will could eventually be reviewed by the Washington State Supreme Court. The respondent attorney contends that as appellate judges they are subject to the Code of Judicial Conduct. The following opinions are relevant in determining the propriety of having the Disciplinary Board having joint counsel with the disciplinary counsel.

Ethics Advisory Committee

Opinion 93-14

Question
When an appellate judge has retained an attorney, should that judge recuse himself/herself when another member of that law firm appears in court even though on a totally unrelated matter? Does it matter if the law firm is a large one, located in a large metropolitan area? Would the same advice be given for cases presently under consideration but not yet decided?
Does it make a difference if the property in question is the separate property of the judge's spouse and there are other parties on the same side?
Answer
CJC Canon 3(C) provides that judicial officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

When an appellate court judge has retained an attorney, the appellate court judge is required to disclose that relationship when a member of that law firm appears in court on a totally unrelated matter and should recuse if there is any objection. This is also true for cases which are presently under consideration but not yet decided.
The size and location of the law firm, the fact that the property in question is the separate property of the spouse and the number of parties on the same side does not make any difference.

In the Superior Court case, the Disciplinary Board, along with hearing examiner Schoggle have engaged Mr. Welden Bar counsel as their attorney. Mr. Busy practices with Mr. Welden in the same firm. This is an automatic disqualification.

In addition since Mr. Busby has the same attorney for virtually the same issues the chances of exparte contact and also is a direct violation of CJC3).

Opinion 89-13

Question
May a court commissioner hear any matters in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved? May a court commissioner hear any matters in which the attorney for the opposing counsel in the lawsuit against the commissioner is involved? May a court commissioner hear any matters in which the attorney is associated with either the commissioner's attorney or associated with opposing counsel?

Answer

CJC Canon 3(C) requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Therefore, a court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.

In this case, a Hearing Examiner, Disciplinary Counsel and the Disciplinary Board together have engaged Mr. Welden as their counsel.

Further the following Canons impose a duty on Judges to disqualify themselves:

Cannons of Judicial Conduct

(D) Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: .

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In this case, the entire Disciplinary Board must disqualify themselves on the basis of this rule alone. By having their counsel file an answer declaring the grievances of the undersigned "frivolous", the Board has demonstrated an incredible personal bias or prejudice concerning the party and have also apparently gained personal knowledge of disputed evidentiary facts concerning the proceeding.

This kind of appearance problem was recently addressed in **In re Disciplinary Proceeding Against Sanders**, No. 200, 145 P.3d 1208, 159 Wash.2d 517 (Wash. 10/26/2006) :

"Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.*fn11 Under Canon 3(D)(1), "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned."*fn12 In Sherman,*fn13 the court found that where a trial judge "may have inadvertently obtained information critical to a central issue on remand, . . . a reasonable person might question his impartiality." *fn14 The court set the test for determining impartiality:

[I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating . . . . The test for determining whether the judge's

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the facts." *fn15
This court in In re Disciplinary Proceeding Against Sanders *fn16 noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one. *fn17 In Sanders, this court balanced that interest against Justice Sanders' First Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: "Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper. *fn18 We concur with the Commission's finding that it was clearly reasonable to question the impartiality of the justice under the circumstances of this case. **In re Disciplinary Proceeding Against Sanders**, No. 200, 145 P.3d 1208, 159 Wash.2d 517 (Wash. 10/26/2006)

By having the same attorney represent both disciplinary counsel and the appellant Disciplinary Board, as well as a hearing examiner, the Board has presented an appearance that it is fashioning a joint defense with disciplinary counsel to the petition of the attorneys in the suit. It is virtually impossible for the attorney representing the hearing officer, disciplinary counsel, and the disciplinary board to fashion a joint defense without some type of communication occurring between them. This appearance cannot be cured disclosing the contents or nature of the representation without breaking attorney-client privilege of other parties to the suit.

D. THIS CASE SHOULD BE DISMISSED ON THE BASIS OF PROSECUTORIAL MISCONDUCT.

In addition to the apparent ex parte communications leading to preconceived bias on the part of the Disciplinary Board, there are other reasons indicating that prosecutorial misconduct has occurred. In what appears to be effort to enhance the penalties and allow for the highest

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

penalties possible he has this case because of what appears to be vindictiveness for his failure to properly set the deposition and also the procedural issue s that are unresolved.

The 11th circuit has specifically said when whenever a prosecutor brings more serious charges following exercise of procedural rights, "vindictiveness" is presumed, provided that the circumstances present itself in actual or realistic fear of vindictiveness. **United States v. Spence**, 719 F. 2d. 358, 361 (11th Cir. 1983) further stating:

> In the classic case prosecutorial vindictiveness case, the subsequent charges are merely "harsher variations of the original

Respondent in this present case is merely exercising his procedural rights under the rules promulgated by the Supreme Court of Washington. The exercise of those rights should not be punished or used for leverage for further punishment whether by design or negligence of disciplinary counsel who continues to advocate disbarment over the exercise of procedural rights.

DATED at Seattle, Washington, this 5th day of November, 2009,

/S/
John Scannell

The undersigned attorney declares that on this date he caused a copy of this document to be served on the undersigned by delivering a copy to their office during business hours and leaving it with the person in charge of accepting their deliveries:

Scott Busby

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

1325 4th Ave. Suite 600
Seattle, Wa., 98101-2539

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 5th day of November, 2009, at Seattle, Wa.,

/S/
John Scannell, WSBA #31035

ACTIONLAW.NET
P.O. BOX 3254
SEATTLE, WASH., 98114
206-624-3685

RECEIVED
AUG 17 2000
W.S.B.A.

GRIEVANCE AGAINST A LAWYER

GRIEVANT	LAWYER
Name: Scannell, John R (Last, First, Middle Initial)	Name: Christine Gregoire (Last, First, Middle Initial)
Address: 593 6th St. (Street Address)	Address: P.O. Box 40100 (Street Address)
Bremerton, Wash. 98312 (City, State & Zip Code)	Olympia, Wash. 98504-0100 (City, State & Zip Code)
Phone: 206 624 3685 / 360 377 7171 (Day) (Evening)	Phone:

Is or was the above-named lawyer your lawyer? Yes ☒ No ☐
If not, how did you come into contact with this lawyer?

Have you discussed this grievance with the above-named lawyer? Yes ☐ No ☒
If yes, what was the result of your discussion?

Do you now have a lawyer other than the above-named lawyer? Yes ☐ No ☒
If you do, please give his or her name, address and telephone number:

Are you involved in a lawsuit or other proceeding related to your grievance? Yes ☒ No ☐
If yes, please identify and give the case or file name and number:
See Below; Case # and name unknown at this time

DESCRIPTION OF YOUR GRIEVANCE

Please concisely explain your grievance in your own words. Give all important dates, times, places and court file numbers. Attach relevant documents. Please send us copies; not your originals.

On May 14, 2000 Christine Gregoire either failed to ensure a timely filing, or at least failed to properly supervise attorneys who she had direct supervisory authority over to ensure timely filing of a notice of appeal in a suit which she accepted responsibility for. In this case she agreed to defend the

actions of DSHS against three developmentally disabled men. As a result, the taxpayers lost their right to appeal a $17.7 million dollar judgment. Christine Gregoire's conduct in this matter violated Washington State Rule of Professional Conduct (RPC) 1.3 which requires a lawyer to act with reasonable diligence and promptness in representing a client.

CONSENT AND AFFIRMATION

I understand that Rule 2.9(c) of the Rules for Lawyer Discipline provides that unless I obtain a protective order or seek the status of a confidential source, the filing of a grievance constitutes my consent to the disclosure of the content of my grievance to the lawyer and to others; and to the disclosure by the lawyer and by others of any information relevant to the investigation. I understand that my grievance may become public.

In filing this grievance with the Washington State Bar Association, I affirm that the information I am providing is true and accurate to the best of my knowledge.

Signature: [signature] Date: 8-14-00

Mail your completed and signed Grievance Against a Lawyer to:

Office of Disciplinary Counsel
Washington State Bar Association
2101 Fourth Avenue - Fourth Floor
Seattle, WA 98121-2330

WSBA

OFFICE OF DISCIPLINARY COUNSEL

Felice P. Congalton
Managing Disciplinary Counsel

September 5, 2000

John R. Scannell
543 6th Street
Bremerton WA 98312

Re: Your grievance against lawyer Christine O. Gregoire
WSBA File: 00-01579

Dear Mr. Scannell:

We received your grievance dated August 14, 2000 against lawyer Christine O. Gregoire. The Washington State Bar Association (WSBA) is authorized to investigate a grievance against a lawyer to determine whether the lawyer's conduct should have an impact on his or her license to practice law. Under the Rules for Lawyer Discipline, a lawyer may be disciplined only upon a showing by a clear preponderance of the evidence that the lawyer violated the Rules of Professional Conduct.

Your grievance is related to the entry of judgment and appeal of *Beckman, et al. v. State of Washington, et al,* Case no. 98-2-05579-6 (Pierce County Superior Court). It is the policy of the WSBA Disciplinary Board to defer disciplinary investigations pending the resolution of civil litigation when the allegations are substantially similar to those in the civil litigation and when such deferral will not endanger the public. We believe the best course of action at this time is to follow that policy and to defer the disciplinary investigation of this matter.

If you disagree with the decision to defer an investigation, this matter will be referred to a Review Committee of the Disciplinary Board pursuant to Rule 2.4(d)(2) of the Rules for Lawyer Discipline with our recommendation that deferral is appropriate. Please inform us when the litigation is concluded and we will consider investigation of your grievance. We ask that lawyers and grievants retain all records, files, and electronic information related to the grievance until they receive written authorization from us or until this matter is concluded and all possible appeal periods have expired.

Sincerely,

Felice P. Congalton
Managing Disciplinary Counsel

FPC:sjk
cc: Christine O. Gregoire

John R. Scannell
543 6th St.
Bremerton, Washington, 98104

Felice P. Congalton
Managing Disciplinary Counsel
Office of Disciplinary Counsel
2101 Fourth Avenue, Fourth Floor,
Seattle, Wash., 98121-2330

Re: My grievance against lawyer Christine O. Gregoire
WSBA File:00-01579

Dear Ms. Congalton,

I have received your letter of September 5, 2000, in which you notified me of the WSBA policy of deferring disciplinary investigations pending the resolution of civil litgation when the allegations are substantially similar to those in the civil litigation and when such deferral will not endanger the public. Under this policy, it is understandable why the Bar Association is not proceeding with an investigation against Ms. Gregoire.

However, it has come to my attention that this is not the first time the Ms. Gregoire has engaged in this type of activity. (See attachment).

On the basis of this new information I would like to amend my charge against Ms Gregoire to include the following:

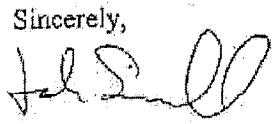
In October, 1998, Christine Gregoire either failed to ensure a timely filing, or at least failed to properly supervise attorneys who she had direct supervisory authority over to ensure timely filing of a notice of appeal in a suit which she accepted responsibility for. In this case the Department of Social and Health Services and two Child Protective service caseworkers lost a half million dollar judgment, because a notice of appeal was not filed on time. Christine Gregoire's conduct in this matter violated Washington State Rule of Professional Conduct (RPC) 1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client.

In June, 2000, Christine Gregoire said in an interview that has far as she knew, her office hadn't missed a civil case in 27 years due to a missed appeals deadline. However, her office had missed a deadline only 20 months earlier causing taxpayers to lose an opportunity of appeal on a half million dollar judgment.

Such conduct violated either RPC 4.1 which states that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact

or law to a third person; or violated RPC 1.1 and 1.3 by not acting with reasonable diligence in representing a client.

Sincerely,



John Scannell

Jan Michels

Local News : Tuesday, June 20, 2000

Costly error not the first by Gregoire's attorneys

by Eric Nalder
Seattle Times staff reporter

State Attorney General Christine Gregoire said in an interview last week that as far as she knew, her office hadn't lost a civil case in 27 years due to a missed appeals deadline.

Make that 20 months.

Records show the Office of the Attorney General failed to file an appeal to the Washington State Supreme Court on time in October 1998. As a result, the Department of Social and Health Services and two Child Protective Service caseworkers had to swallow a half-million-dollar judgment without getting a chance to argue it before the high court.

The assistant attorney general in charge of that case, Peter Berney, apparently miscalculated the deadline by a day. Then, instead of rushing the appeal papers to the court, he mailed them. The papers arrived five days late.

Berney submitted a 12-page brief asking the court to accept his appeal anyway, but on Jan. 6, 1999, he got this terse reply from Chief Justice Barbara Durham:

"The Court rejects the contention that the petition was timely filed, and denies the motion for an extension of time."

Berney didn't recall the details of the case, but said he wasn't disciplined for it and it wasn't as serious as the latest fumbled appeal by Gregoire's office.

Last month, lawyers in the attorney general's Seattle office missed by 10 days a deadline to appeal the biggest verdict ever

rendered against the state - for $17.8 million.

The case was brought on behalf of three developmentally disabled men who were allegedly sexually and physically abused in a state-licensed home in Bremerton. Their attorney successfully asserted DSHS had ignored warnings and signs of the abuse.

A private attorney hired by Gregoire's office has filed a 14-page brief claiming that an injustice will be done if the state Court of Appeals in Tacoma doesn't allow the state to challenge the verdict. **Gregoire** says an assistant attorney general, Janet Capps, did not alert her superiors that she'd received documents warning of an approaching deadline.

In the 1998 case, Berney argued without success that he'd calculated the date correctly, and also that he shouldn't be penalized for the time it takes for papers to arrive in the mail.

To this day, Berney feels he was right and the court was wrong. And he explains his procrastination this way: He had to take the appeal right up to the deadline because he was waiting for another decision from a lower court that would bear on his case.

Besides, Berney said, the 1998 case is less significant than the one going on now because it was before the State Supreme Court. The high court doesn't have to hear cases even if they are filed on time. In other words, it is possible that even if he had made the deadline, his case might not have been heard.

Cases filed on time to the Court of Appeals must get a hearing.

The 1998 case arose from a case where a King County Superior Court jury found that the state had botched an investigation of alleged child abuse and wrongly removed a daughter from her father for two years. The attorney general appealed the verdict to the Court of Appeals and whittled away a small portion of the judgment, $10,000. The remaining $500,000 stuck when the attorney general failed to file the case to the Supreme Court on time.

Appeal deadlines are the most important deadlines for an attorney to honor, said Phillip Raymond, the attorney for the father whose daughter was taken away.

"You'd expect someone to be careful with a half a million dollars of the taxpayers' money," said Kent Meyer, a fellow attorney who assisted him in the case.

seattle P-I.com Northwest

Bar may discipline lawyer over $18 million mistake

Saturday, August 19, 2000

By HUNTER T. GEORGE
THE ASSOCIATED PRESS

OLYMPIA -- The state lawyer blamed for making a mistake that could cost taxpayers more than $18 million could face disciplinary action by the Washington State Bar Association.

The bar announced yesterday that a grievance has been filed against Janet Capps, a former assistant attorney general who was forced to resign last month.

Capps was one of two state attorneys defending the government against allegations that the Washington Department of Social and Health Services was negligent in licensing a group home in Bremerton where three developmentally disabled men claimed they were abused and molested.

A Pierce County jury sided with the men and awarded them a total of $17.8 million, the largest verdict ever against the state. It gets bigger each day as the award accumulates interest.

The state planned to appeal, but missed the 30-day deadline.

Attorney General Christine Gregoire asked the Washington Court of Appeals last month to waive the deadline and allow the state to appeal the verdict to prevent "a miscarriage of justice."

A ruling could be issued any day now.

Bar association spokeswoman Judy Berrett said the organization completed "preliminary work" on the grievance and will defer further investigation until any litigation involving the case is resolved as there is "no immediate risk to the public."

The bar did not disclose whether the organization was acting on its own or if someone else had filed the complaint.

John R. Scannell
543 6th St.
Bremerton, Washington, 98104

Jan Michels
Executive Director
Washington State Bar Association
2101 Fourth Avenue, Fourth Floor,
Seattle, Wash., 98121-2330

Dear Ms. Michels;

It has come to my attention that it was under your authority that the Bar Association decided to make public the grievance against Janet Capps. As far as I can tell, you apparently derived your authority under RLD 11.1(o). If this is true, could you please state exactly the reason under the rules by which you exercised this authority? If not, please correct my understanding on the authority upon which you authorized making this information public.

I had filed a similar grievance against Christine Gregoire, shortly before the you made the decision. That grievance has now been amended. It seems to me, as a matter of fairness, you should take similar action against Ms. Gregoire. First of all, if there has been misconduct by Ms. Gregoire, it certainly would be necessary to protect the public by publicizing the grievance even more since Ms. Gregoire is an elected public official in charge of the entire agency. There should be even more of a reason to make public the information in lieu of the fact that the Court of Appeals has already ruled that fault in this situation could be attributed to Gregoire in that she failed to organize the office adequately to protect against a mistake such as this.

The Bar Association is currently proceeding against former legislator Paul King for a far less serious case of mismanagement of an office concerning a missed deadline in case #00-00061. In that case, a missed deadline in a small claims action carried a presumptive punishment of at least an admonishment since no harm was done to the client. Using the standards of the King case, it appears that a primae facie showing has been made for a presumptive punishment of suspension of at least 6 months because there has been multiple violations in a short period of time, one charge involving dishonesty. In a case like this, the public is certainly entitled to know that such charges are pending, before they re-elect Ms. Gregoire.

For that reason, I am moving that you take the same action against Gregoire that you have already taken against Capp, namely publicizing the grievance before the investigation has begun, because of the intense public interest in these charges. In the event you fail to grant my motion, I would appreciate it if you would give your reasoning for your ruling.

Sincerely,

John Scannell

WSBA

WASHINGTON STATE BAR ASSOCIATION

M. Janice Michels
Executive Director

John R. Scannell
543 - 6th Street
Bremerton, WA 98337-1417

October 4, 2000

Dear Mr. Scannell:

We have your recent undated letter asking the Washington State Bar Association to make a public announcement about the grievance you filed against attorney Christine Gregoire.

The Supreme Court's Rules for Lawyer Discipline require the Association, but not the grievant, to maintain a grievance as confidential except as specifically permitted under the rules. Rule 11.1(o) permits the Association in its discretion to release confidential information "when to do so appears necessary to protect the interests of clients or other persons, the public, or the integrity of the Bar." Because of the rule's clear policy of maintaining the confidentiality of grievances, it is only very rarely that the Association exercises its discretionary authority.

The Association exercised its discretionary authority to make public the filing of a grievance in the case of Assistant Attorney General Janet Capps, to which your letter refers, on the basis of the very extensive publicity regarding the situation in question and on the basis that the integrity of the Bar and its role in discipline required that it acknowledge its awareness of that situation. My decision to reveal the presence of a grievance was based on preserving the integrity of the discipline system unrelated to the parties involved. Having made that announcement, it is now public knowledge that the Association is aware of the situation in question, and thus there is no reason for further announcements. Accordingly, the Association declines your request to exercise its discretionary authority to make any public announcement regarding your grievance.

Your letter states that "the public is certainly entitled to know that such charges are pending, before they re-elect Ms. Gregoire." A grievance is merely an unsubstantiated accusation of ethical wrongdoing. The mere filing of your grievance against Ms. Gregoire does not mean any "charges" are pending against her or that the public is entitled to know about an as yet unsubstantiated grievance.

Sincerely,

M. Janice Michels

M. Janice Michels
Executive Director

Executive Director • 2101 Fourth Avenue, Fourth Floor • Seattle, WA 98121-2330 • 206-727-8240 • Fax 206-[illegible] • e-mail: janem@wsba.org

WSBA

OFFICE OF DISCIPLINARY COUNSEL

Felice P. Congalton
Managing Disciplinary Counsel

Date: 10/2/00 WSBA File No. 00-01579

To the Lawyer:

We received the enclosed information ~~dated~~ on 9/22/00 from the grievant in the file noted above. As required by the Rules for Lawyer Discipline (RLDs), we are providing the information to you for the following reason:

☐ 1. The information relates to a grievance filed against you. You may respond to this additional information. Absent special circumstances and unless you provide us with reasons to do otherwise, the grievant will be provided with a copy of your response pursuant to RLD 2.9(a)(4).

☐ 2. The enclosed information disputes the dismissal of a grievance. As required by the RLDs, a Review Committee of the Disciplinary Board will reconsider the dismissal. The Review Committee process normally takes four to eight weeks to complete. We strongly encourage you to respond to the grievance if you have not already done so. If you have additional information for the Review Committee's consideration, please submit it to us within two (2) weeks from the date of this letter. You and the grievant will be notified of the Review Committee's decision after the Review Committee issues its order in this matter. In some situations, all of the information in a grievance file becomes public as a result of a Review Committee's decision. See RLD 11.1(c) and (g).

☐ 3. The information will be considered by a Review Committee of the Disciplinary Board. A copy is being provided to the Review Committee.

☒ 4. The information relates to a grievance filed against you. As this matter has been deferred ~~closed~~, we will take no ~~further~~ action at this present time.

Sincerely,

Felice P. Congalton
Managing Disciplinary Counsel

Enclosure
Copy: Grievant Maxwell
(without enclosure)

Law Office of Paul H. King

Attorneys
Paul H. King

117 Jackson Building
318 Sixth Avenue South
Seattle, WA 98104
Phone: (206) 624-3685
Fax: (206) 343-0929
E-mail: paulking@nwlink.com
Web Site: http://www.nwlink.com/~paulking/

Legal Intern
John R. Scannell

October 11, 2000

Felice P. Congalton
Managing Disciplinary Counsel
Office of Disciplinary Counsel
2101 Fourth Avenue, Fourth Floor
Seattle, Wash., 98121-2330

Dear Ms. Congalton,

I have received your letter deferring the second set of bar complaints I filed against Christine Gregoire, on September 22, 2000, which is now part of WSBA file: 00-01579. Please consider this letter of a notification that I disagree with your decision to defer investigation of this set of complaints. The reason I disagree is that neither of the two instances cited in my complaint of Sept. 22 are currently the subject of civil litigation. Therefore, I do not believe that good cause exists for deferral at this time. Please forward this to the appropriate Review Committee for their consideration pursuant to RLD 2.4(d)(2).

Sincerely,

John Scannell

RECEIVED
OCT 11 2000
W.S.B.A.

FILE

WSBA

OFFICE OF DISCIPLINARY COUNSEL

Anne I. Seidel
Senior Disciplinary Counsel

direct line: (206) 239-2109
fax: (206) 727-8325

November 2, 2001

Christine O. Gregoire
Attorney at Law
PO Box 40100
Olympia, WA 98504

John R. Scannell
543 6th Street
Bremerton, WA 98312

Re: John R. Scannell grievance against Christine O. Gregoire
WSBA File No. 00-01579

Dear Ms. Gregoire and Mr. Scannell:

Maria Regimbal has left the Bar Association, and I have been assigned to the above grievance. Because the Review Committee that reviewed this case in February did not issue an order on the deferral issue, we are sending this to another Review Committee. I am enclosing a copy of the Report to the Review Committee. The Committee is expected to meet in mid-December. You will receive a copy of the Committee's order directly from the Clerk to the Disciplinary Board.

If you have any questions, please feel free to contact me.

Sincerely,

Anne I. Seidel
Senior Disciplinary Counsel

Enc.

WASHINGTON STATE BAR ASSOCIATION
DISCIPLINARY BOARD
2101 Fourth Avenue - Fourth Floor · Seattle, Washington 98121-2330
Telephone: (206) 727-8280 · Fax: (206) 727-8320

STEPHEN C. SMITH
Chair of the Disciplinary Board

NOTICE

On the attached is a copy of the Findings and Order of the Review Committee of the Disciplinary Board.

Dismissal and Dismissal with Advisory Letter

If you do not mail or deliver a written request for review within 45 days of mailing of this notice of the Review Committee's order dismissing a grievance, the dismissal will be final. See the attached order. The request for review of a Review Committee's order dismissing a grievance should be mailed or delivered to the Disciplinary Counsel in charge of the case or to the Office of Disciplinary Counsel, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330. The Chairperson of the Disciplinary Board will consider the request for review and can either uphold the decision of the Review Committee or order its consideration by the full Disciplinary Board. Under Rule 2.3(f)(6) of the Rules for Lawyer Discipline, **the decision of the Chairperson of the Disciplinary Board is not appealable.**

When a Review Committee dismisses a grievance, it also may send the lawyer an advisory letter cautioning the lawyer about his or her conduct. An advisory letter is not a finding of misconduct, is not a disciplinary sanction, and is not public information. It is intended to warn and educate the lawyer about conduct that could result in similar grievances.

Admonition

If the Review Committee determined that there was sufficient misconduct under the Rules for Lawyer Discipline to warrant the issuance of an Admonition under Rule 5.5A of the Rules for Lawyer Discipline, a written Admonition will be issued shortly, and made a part of the lawyer's records with the Washington State Bar Association. An admonition is disciplinary action for the purposes of rules 11.1 and 11.2 of the Rules for Lawyer Discipline, and is public information. RLD 5.5A(f).

The respondent lawyer may file a protest of the Admonition within 30 days of service of the Admonition. Upon receipt of a timely protest, the Admonition is rescinded, and the grievance is considered to have been ordered to a public hearing by the Review Committee issuing the Admonition. The grievant will be notified if a protest is filed by the respondent lawyer. A grievant may not protest or appeal the issuance of an Admonition.

Order to Hearing or Other Action

If the Review Committee has ordered a public hearing or other action, and you have any questions, please contact the Disciplinary Counsel in charge of the file or the Office of Disciplinary Counsel at (206) 727-8207.

Date: December 17, 2001 File Number: 00-01579

Mailed To: CHRISTINE GREGOIRE, John R. Scannell

FILED

DEC 14 2001

DISCIPLINARY BOARD

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION
F.J. Dullanty (Chair), Virginia Leeper and Mary L. Wilson
FINDING AND ORDER OF REVIEW COMMITTEE III

W.S.B.A FILE NO. 00-01579

LAWYER: CHRISTINE GREGOIRE Grievant: John R. Scannell

Having reviewed the materials regarding the above captioned grievance, Review Committee III of the Disciplinary Board of the WSBA hereby makes the following findings, conclusions and order pursuant to the authority granted by Rule 2.4(d) of the Rules for Lawyer Discipline:

( ) There is sufficient evidence of unethical behavior to take further action, and IT IS ORDERED: that a hearing should be held on the allegations of the grievance.
( ) and consolidated with other grievances against this lawyer.

( ) There is no evidence or insufficient evidence of unethical behavior to prove misconduct by a clear preponderance of the evidence, and IT IS ORDERED: that the grievance should be dismissed with no further action. Should there be a judicial finding of impropriety, the grievant may request that the grievance be reopened.

( ) The allegations in the grievance do not constitute misconduct under either the Rules of Professional Conduct or the Rules for Lawyer Discipline. Hence, the WSBA does not have the authority to take further action, and IT IS ORDERED: that the grievance should be dismissed with no further action.

( ) The allegations in the grievance do not constitute a sufficient degree of misconduct which would warrant further action except IT IS ORDERED: that an admonition should be issued to the lawyer. (RLD 5.5A.)

( ) There is not sufficient evidence of unethical behavior to prove misconduct by a clear preponderance of the evidence, and it is ORDERED that the grievance is dismissed, but an advisory letter be sent to the lawyer pursuant to RLD 5.6 cautioning the lawyer regarding _____

( ) There is a need for further information and IT IS ORDERED that further investigation be conducted in the area of: _____

(X) There is pending civil or criminal action which involves substantially similar allegations and IT IS ORDERED that investigation and review of this grievance should be deferred pending resolution of the civil or criminal litigation.

( ) _____

( ) and IT IS ORDERED

Dated this 14th day of December 2001

The vote was 3-0

F.J. Dullanty, Chairperson
Review Committee III

WSBA
OFFICE OF GENERAL COUNSEL

FILED
NOV 25 2008
DISCIPLINARY BOARD

Julie Shankland
Assistant General Counsel

direct line: 206-727-8280
fax: 206-727-8314
e-mail: julies@wsba.org

November 25, 2008

John R. Scannell
P.O. Box 3254
Seattle, WA 98114-3254

Re: Your Motion to Recuse For Conflict With Respondent Attorney on Case And/Or Stay or Dismissal of Proceedings.

Dear Mr. Scannell,

I am returning your Motion to Recuse filed on September 2, 2008. As you know, you have two public proceedings pending. Proceeding 05#00113 is set for a hearing on Monday, December 1, 2008. The new proceeding, number 08#00074 was opened on September 23, 2008. This motion was originally placed in the 05#00113 file, because that was the only public file open on the date you delivered the motion. In a recent review of our files, we discovered that this motion may belong in the 08#00074 file; however, that file did not exist when you filed this motion. Additionally, this motion does not have a proof of service attached. Based on our inability to determine your intentions, we are returning the motion to you. If you intend to file this motion, please use the correct proceeding number so that we can correctly file your pleading. Additionally, please make certain that you serve disciplinary counsel and file a proof of service with your pleading.

Very Truly Yours,

Julie Anne Shankland
Assistant General Counsel

Enclosures (original pleading)

009

The Honorable John P. Erlick
August 14, 2007

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOHN SCANNELL & PAUL KING, Petitioners, vs. STATE OF WASHINGTON, WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY COMMITTEE, SCOTT BUSBY, GAIL MCMONAGLE, and DAVID MARTIN SCHOEGGL, Respondents.	No. 06-2-33100-1 SEA NOTICE OF APPEARANCE

TO: JOHN SCANNELL and PAUL KING, Petitioners,

AND TO: CLERK OF COURT

NOTICE IS HEREBY GIVEN that the Respondents Washington State Bar Association Disciplinary Committee (Disciplinary Board), Scott Busby, Gail McMonagle, and David Martin Schoeggl hereby appear in the above-entitled cause by the undersigned attorney, and request that all further papers and pleadings, except original process, be served upon the undersigned attorney.

ORIGINAL

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 727-8232

DATED this 24th day of July, 2007.

Robert D. Welden, WSBA # 5947
Attorney for Respondents Washington State Bar Association Disciplinary Board. Scott Busby, Gail McMonagle and David Martin Schoeggl

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 727-8232

The Honorable John P. Erlich
August 14, 2007

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

JOHN SCANNELL and PAUL KING, Petitioners, vs. STATE OF WASHINGTON, WASHINGTON STATE BAR ASSOCIATION DISCIPLINARY COMMITTEE, SCOTT BUSBY, GAIL MCMONAGLE, and DAVID MARTIN SCHOEGGL, Respondents.	No. 06-2-33100-1SEA WSBA RESPONDENTS MOTION TO DENY FOR LACK OF SUBJECT MATTER JURISDICTION; FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AND FAILURE TO JOIN A NECESSARY PARTY

I. RELIEF REQUESTED

Respondents Washington State Bar Association Disciplinary Committee (*sic*; the correct title is "Disciplinary Board"), Scott Busby, Gail McMonagle, and David Martin Schoeggl (herein, WSBA Respondents) respectfully move this Court for an order denying this petition for lack of subject matter jurisdiction (CR 12(b)(1)), for failure to state a claim upon which relief can be granted (CR 12(b)(6)), and for failure to join a necessary party (CR 12(b)(7)).

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue · Suite 600
Seattle, WA 98109-2539
(206) 727-8232

II. PROCEDURAL ISSUES

Petitioners Scannell and King have filed, singly or together, a Petition and Amended Petition. They have served Respondent Schoeggl with the Petition and Amended Petition, and also with a Second Amended Petition. Despite a request to do so, they have not filed the Second Amended Petition. It is attached as Exhibit A. All of their petitions seek Writs of Prohibition and Mandamus. However they have not complied with LR 98.40 in that they have filed neither a legal memorandum explaining why there is no adequate remedy at law; nor a declaration or affidavit in support of their factual assertions, despite the fact that all three petitions state that there are attached declarations of the Petitioners.

Petitioners Scannell and King have only served Respondent Schoeggl. However, for purposes of this Motion to Dismiss, the other WSBA Respondents waive service.

III. STATEMENT OF FACTS

Petitioner John Scannell is the respondent in a disciplinary proceeding pending before the Disciplinary Board of the Washington State Bar Association, *In re John R. Scannell*, No. 05#00113. He represents himself in that proceeding. *See*, Exhibit B, Notice of Appeal of Chief Hearing Examiner's Order. Likewise, Petitioner Paul King is the respondent in a separate disciplinary proceeding, *In re Paul King*, No. 05#00118. He also represents himself. *See*, Exhibit C, Notice of Appearance. Pursuant to ER 201, the Court is requested to take judicial notice of these adjudicative facts as evidenced by these documents copied from the originals filed with the Disciplinary Board. Contrary to the statement in ¶ 2.2 of the Second Amended Petition (Am. Pet.

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 727-8232

2), Scannell is not "an attorney for Paul King, in actions before the Washington State Bar Association Disciplinary committee" [*sic*].

Scannell and King have made various assertions regarding the taking of depositions by way of motions in the disciplinary proceedings. Their motions have been denied because they are without factual or legal basis. Am. Pet. 2, ¶ 2.5.

Petitioners Scannell and King seek to have the Superior Court involve itself in two lawyer disciplinary proceedings pending before the Disciplinary Board and conducted pursuant to rules of the Washington Supreme Court, the Rules for Enforcement of Lawyer Conduct (ELC). They have filed a Petition, Amended Petition and Second Amended Petition (not filed but served) for Writ of Prohibition, Mandamus, Injunction, Complaint for Declaratory Judgment. The first Petition was filed only by Scannell. The Amended and Second Amended Petitions add King as a Petitioner. They all seek essentially the same result, the involvement of the Superior Court in bar disciplinary proceedings conducted under the authority of the Washington Supreme Court. This includes enjoining an on-going disciplinary proceeding.

IV. STATEMENT OF ISSUES

Whether the Superior Court has jurisdiction on the subject of attorney discipline, which is within the sole jurisdiction of the Supreme Court.

V. EVIDENCE RELIED UPON

This motion is based on the files and records herein.

VI. AUTHORITY

A. The Superior Court Lacks Subject Matter Jurisdiction in Lawyer Disciplinary Proceedings. The Superior Court is without jurisdiction to determine matters relating

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98109-2539
(206) 727-8232

to the discipline, disbarment, suspension, or reinstatement of lawyers. The Washington Supreme Court has that sole and inherent authority. ELC 2.1 provides:

> The Supreme Court of Washington has *exclusive responsibility* in the state to administer the lawyer discipline and disability system and has *inherent power* to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability. Persons carrying out the functions set forth in these rules are acting under the Supreme Court's authority. [emphasis added].

See, Ex rel. Schwab v. State Bar Association, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972); *Graham v. State Bar Association*, 86 Wn.2d 624, 548 P.2d 310 (1976); *Washington State Bar Association v. State of Washington*, 125 Wn.2d 901, 840 P.2d 1047 (1995). "[T]he power to admit and enroll attorneys in the state of Washington, together with the power to disbar, is exclusively in the Supreme Court." *In re Schatz*, 80 Wn.2d 604, 607, 497 P.2d 153 (1972), citations omitted.

The Supreme Court delegates to the Washington State Bar Association the administrative and adjudicative functions relative to this power. *See*, General Rule (GR) 12, Admission to Practice Rule (APR) 2, and ELC 2.2. When the Washington State Bar Association conducts disciplinary investigations and proceedings, it does so as the agent of the Washington Supreme Court. *Hahn v. Boeing Company*, 95 Wn. 2d 28, 621 P.2d 1263 (1980); *State ex rel. Schwab v. State Bar Association, supra.*

The Superior Court has no authority to compel action by members of the Disciplinary Board, or to review a decision of the Disciplinary Board. Any such action is the exclusive responsibility of the Supreme Court. ELC 2.1. The ELCs provide Petitioners with the right to seek review of a decision of the Disciplinary Board by the Supreme Court. ELC 12.2.

The only exception to this lack of jurisdiction is that the Supreme Court has delegated to the Superior Court contempt authority to enforce subpoenas. ELC 4.7. This illustrates that the Superior Court's authority in lawyer disciplinary proceedings is

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98109-2539
(206) 727-8232

limited to the authority delegated by the Supreme Court. The Supreme Court has delegated no other authority to the Superior Court in lawyer disciplinary proceedings.

B. Petitioners Have Failed to State a Claim Upon Which Relief Can Be Granted. Petitioners assert, without any legal authority, that ELC 5.5 is "unconstitutional." ELC 5.5 provides:

> **DISCOVERY BEFORE FORMAL COMPLAINT**
>
> **(a) Procedure.** Before filing a formal complaint, disciplinary counsel may depose either a respondent lawyer or a witness, or issue requests for admission to the respondent. To the extent possible, CR 30 or 31 applies to depositions under this rule. CR 36 governs requests for admission.
>
> **(b) Subpoenas for Depositions.** Disciplinary counsel may issue subpoenas to compel the respondent's or a witness's attendance, or the production of books, documents, or other evidence, at a deposition. Subpoenas must be served as in civil cases in the superior court and may be enforced under rule 4.7.
>
> **(c) Cooperation.** Every lawyer must promptly respond to discovery requests from disciplinary counsel.

The basis for this assertion of "unconstitutionality" is not entirely clear. Petitioners assert that bar counsel acted improperly in taking a precharging deposition of Scannell and King without notice to the other. Am. Pet. 2, ¶ 2.4. Civil Rule (CR 30) requires notice of the taking of an oral deposition "to every other party to the action and to the deponent." CR 30(b)(1). Prior to commencing a disciplinary action by the filing of a Formal Complaint (ELC 10.3(a)), there are no parties to an investigation other than the respondent attorney. Since neither Scannell nor King is a party in the investigation of the other, no notice is required. And, as discussed above, neither Scannell nor King is a party in the other's disciplinary proceeding.

They also assert that bar counsel has conducted "secret depositions," but offer no facts in support of that assertion. Am. Pet. 2, ¶ 2.6. Their other arguments that ELC 5.5 is unconstitutional in that it violates constitutional protections against unreasonable

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98109-2539
(206) 727-8232

searches and seizures and invades the private affairs of individuals are specious, since RPC 5.5 gives no broader authority than CR 30.

In the event that bar counsel or the Disciplinary Board exceed or abuse their authority, the proper forum for review is the Washington Supreme Court. The Court has held that "[w]hen the Disciplinary Board fails to carry out its duties regarding discipline, we will protect the process by exercising our inherent power to review the entire matter." *In re Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161 (1982).

C. Petitioners Have Failed to Join a Necessary Party. Scannell and King allege that they have suffered damage by the acts of the Washington State Bar Association in administering the rules of the Washington State Supreme Court, a position for which they have offered no legal or factual basis. Yet they have not named the Supreme Court, whose rules they are, as Respondent herein.

Scannell and King have not brought this matter in front of the body with the power to resolve their complaints. For the reasons set forth in this motion, their petition should be denied.

DATED this 24th day of July, 2007

Respectfully submitted,

Robert D. Welden, WSBA #5947
Attorney for Respondents Washington State Bar Association Disciplinary Board. Scott Busby, Gail McMonagle and David Martin Schoeggl

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98109-2539
(206) 727-8232

OFFICE RECEPTIONIST, CLERK

To: John Scannell; Scott Busby
Cc: Chandler, Desiree R.
Subject: RE: Answer and Cross Petition RE: In re Scannell, Supreme Court No. 200,737-6

Rec. 11-5-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: John Scannell [mailto:Zamboni_John@actionlaw.net]
Sent: Thursday, November 05, 2009 4:29 PM
To: Scott Busby; OFFICE RECEPTIONIST, CLERK
Cc: Chandler, Desiree R.
Subject: Answer and Cross Petition RE: In re Scannell, Supreme Court No. 200,737-6

Attached for filing are the following
1. Answer and Cross Petition plus attachments

From: Scott Busby [mailto:ScottB@wsba.org]
Sent: Wednesday, November 04, 2009 4:30 PM
To: SUPREME@COURTS.WA.GOV
Cc: John Scannell; Desiree.Chandler@courts.wa.gov
Subject: In re Scannell, Supreme Court No. 200,737-6

Attached for filing are the following:

1. Disciplinary Counsel Declaration re Respondent's Motion for Continuance; and
2. Disciplinary Counsel's Declaration of Service by Mail.

I would appreciate receiving confirmation that these documents have been received.

Thank you,
Scott G. Busby

Scott G. Busby, Disciplinary Counsel
Washington State Bar Association
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
Phone: (206) 733-5998
Fax: (206) 727-8325
scottb@wsba.org